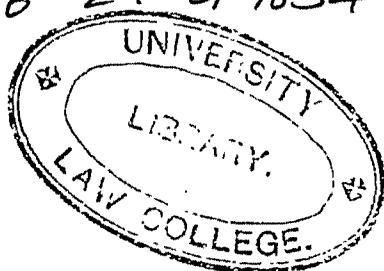


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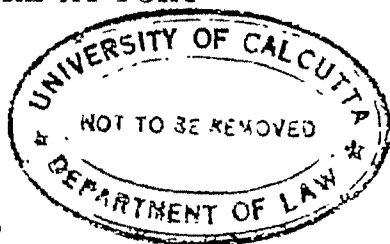
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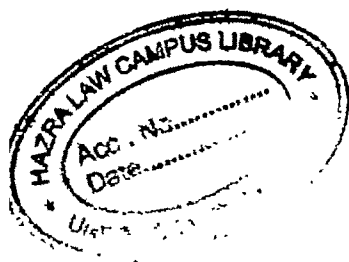
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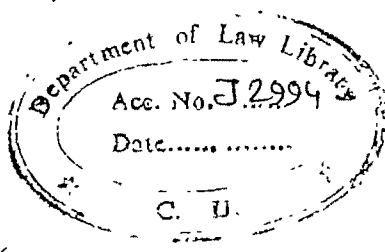
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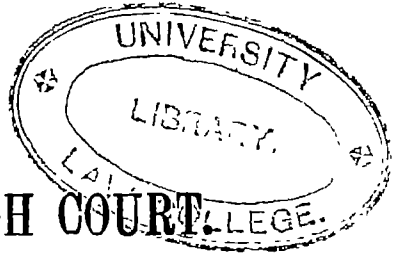
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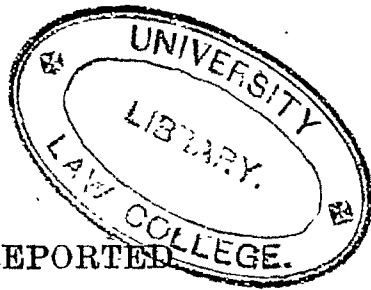


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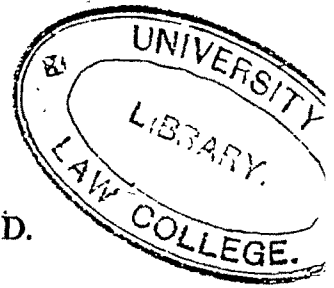


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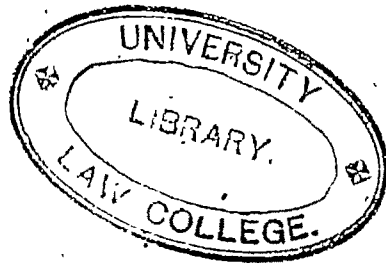
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Reports.

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FULL BENCH.

*Before Mr. Justice Fletcher, Mr. Justice N. R. Chatterjea,
Mr. Justice Teunon, Mr. Justice Richardson and Sir
Asutosh Chaudhuri, Knight, Judge.*

MANI LALL SING

v.

TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.*

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1917.
July, 24, 25, 26, 27,
August, 14,

*Recoupment—Betterment—Calcutta Improvement Act (V B. C. of 1911), Secs.
41 (a), 42 (a), 78, 81—Full Bench, reference to, validity of—Statute,
interpretation of.*

Held by the Full Bench (*N. R. Chatterjea, J. dissente*):

The Calcutta Improvement Act authorises the Board of Trusters to acquire land compulsorily for purposes of recoupment, that is, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78.

Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose (1) overruled on the point.

"Affected" in section 42 (a) of the Calcutta Improvement Act, means affected in any way ; and the words "by the execution of the scheme" in that section mean "through or owing to the execution of the scheme."

Clause (a) of section 42 should be read with clause (a) of section 41.

* Full Bench Reference in Appeal from Original Civil No. 91 of 1916, against the judgment of Mr. Justice Greaves, dated the 5th June, 1917.

(1) (1916) I. L. R. 44 Calc. 219 ; 24 C. L. J. 246.

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Fletcher and Richardson, JJ. (*N. R. Chatterjee, J.* dissenting). The rule that the Full Bench, if looking into the case as far as is necessary for the purpose it should find that the point does not arise, ought to desist from answering it, is not applicable to regular appeals.

N. R. Chatterjee, J. : It is an error to rely on punctuation in construing Acts of the legislature : *Maharani of Burdwan v. Krishna Kamini Dasi* (1) referred to.

The land 'required for the scheme' in section 41 (a) of the Calcutta Improvement Act, means the land which is actually required for what may be called the engineering or construction works.

The word 'affected' in section 42 (a) has no reference to value. It is used in the sense of 'acted upon physically or materially.'

An Act cannot be construed with reference to the provisions of another Act. The question whether the Calcutta Improvement Act gives power to the Board of compulsory acquisition of land for the purposes of recoupment, must be determined with reference to the provisions of that Act.

The Calcutta Municipal Act gives wider powers to the Corporation than those given to the Board by the Calcutta Improvement Act.

Section 81 of the Calcutta Improvement Act comes into operation only when land has been acquired by, or vested in, the Board.

Richardson, J. : 'Land affected' in section 42 (a) of the Calcutta Improvement Act, means land affected for the better. The words 'by the execution of the scheme' which qualify the word 'affected' refer not only to the period of construction but also to the period immediately following when the improvement scheme is completed and in operation.

The general rule for the construction of statutes is that the legislature means what it says. The words best declare the intention. But owing perhaps to the imperfection of language as an instrument, or to the fact that language is sometimes mis-used even in legislative enactments, it may not always be easy to say what the meaning is. The language may be doubtful or ambiguous. The Courts may have a choice between different possible constructions, and in such cases there may be subsidiary rules or principles more or less controlling the choice according to the nature of the subject matter, whether the Act is penal or remedial and so forth. Beyond that there is more delicate ground where the strict literal meaning would lead to a result so absurd as to be irrational, and it may be found possible to modify the meaning so as to avoid that result.

Sussex Peerage Case (2) referred to.

It is the function of general words to include things not specially named.

Appeal by the Plaintiff.

The suit was instituted on the Original Side of the High Court by the plaintiff as the owner of certain premises against the Trustees for the Improvement of Calcutta and the Land Acquisition Collector for the purpose of obtaining an injunction to restrain the defendants

(1) (1886) I. L. R. 14 Calc. 365 (372).

(2) (1844) 11 Cl. & F. 85.

from acquiring the said premises or doing any acts in furtherance thereof. The suit was dismissed by Greaves J. who held that the lands in suit were required for the purposes of the Calcutta Improvement Act and that recoupment was one of such purposes. The plaintiff appealed against that judgment.

On appeal a reference to Full Bench was made by the following judgments:

Sanderson, C. J.—This case comes before us sitting as a Court for the hearing of appeals from the Original Side of the High Court and it is an appeal from the judgment of Greaves J. which was delivered on the 17th July, 1916.

The plaintiff was the owner of certain premises No. 10, Halliday Street and the defendants were the Trustees for the Improvement of Calcutta and Mr. Peterson the Land Acquisition Collector. The suit was filed for the purpose of obtaining an injunction to restrain the defendants from acquiring the said premises or doing any acts in furtherance thereof.

The land in question, No. 10, Halliday Street, lies to the west side of Halliday Street, the widening of which formed the basis of the Scheme No. VII.A. There was some discussion during the argument in this Court, as to how much of No. 10, Halliday Street, had been taken for the actual street widening.

It was, however, finally agreed by the learned counsel engaged in the appeal that the strips of land to the north and south of No. 10, which had been taken for the purpose of widening Tara Chand Dutt Street and Zakaria Street, (which is not named on the plan, but which is the street to the south of No. 10) had been taken under another Scheme or other Schemes, and that only the portions of No. 10 required for rounding off the corners formed by the junction of these two streets with Halliday Street had been taken in Scheme VII-A, so far as the actual widening of Halliday Street was concerned.

The remainder of No. 10, Halliday Street, the Trustees contend they are entitled to acquire compulsorily under their Improvement Scheme as land "which will, in their opinion, be affected by the execution of the Scheme" within the meaning of section 42.

The issue upon which the case was decided was the 5th, which runs as follows:—

(5). Are the lands in suit, or any portion thereof, required for the purposes of the Act? Is recoupment one of such purposes?

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Greaves J. decided this issue in favor of the Trustees. The question depends upon the interpretation of the provisions of the Bengal Act No. V. of 1911, an Act to provide for the Improvement and Expansion of Calcutta.

Last year Mookerjee and Cuming JJ. sitting as a Division Bench on the Appellate Side of the Court, heard an appeal in the case of the *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1): It was an appeal by the Trustees from a judgment of the Subordinate Judge of the 24-Pegannas, and judgment was delivered by the Division Bench on August 22nd, 1916. In that case the question whether the Trustees were entitled to acquire land compulsorily for the purpose of "recoupment" was involved, and the learned Judges came to a conclusion as to the construction of the Act contrary to that arrived at by Greaves J. in the case now under appeal.

As at present advised, I agree with the conclusion arrived at by Greaves J. As already stated the issue included the question "Is recoupment one of such purposes?" It might have been more accurate to say "Is 'recompment' one of the means authorised by the Act for carrying out the objects of the Act but it is plain from the judgment^a that no misunderstanding occurred from the form of the issue.

I agree with Greaves J's interpretation of the words "affected" in section 42 and I think the Trustees have power to acquire compulsorily land which, in their opinion, will be affected by the execution of the scheme with a view to selling or otherwise dealing with the same under section 81 or to the payment of a sum of money under section 78. Consequently, as at present advised, I am unable to agree with the decision in the case of the *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), in so far as it decides the contrary, and as my learned brothers, Woodroffe and Chitty JJ., have come to the same conclusion, the question of law must be referred to a Full Bench in pursuance of the rules of this Court.

In view, therefore, of the fact that this appeal must be re-argued before a Full Bench, I do not think it necessary to deal in detail with the sections of the Acts or the arguments presented to us. It is sufficient for me to say that I have read the judgments about to be delivered by my learned brothers Woodroffe and Chitty JJ. and that, as at present advised, I agree with the conclusions arrived at by them.

(1) (1916) I. L. R. 44 Calc. 219 ; 34 C. L. J. 246.

The question to be referred to the Full Bench is whether the case of the *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), in so far as it holds that the Act V of 1911 (B.C.) does not authorise the Board of Trustees to acquire land compulsorily for purposes of "recoupment," i.e., by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78, was rightly decided. It was agreed by the learned counsel engaged in Appeal 92 of 1916 that it would be covered by the decision in 91 of 1916.

Woodroffe, J.—Something has been said as to the supposed novelty and arbitrary character of the principle of recoupment. In England the principle is well-known.

"Municipal and other public bodies are sometimes given powers to take land beyond that which is necessary for the actual execution of the proposed works in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the taxpayers. These lands are said to be authorised to be taken for the purpose of 'recoupment' as the public body is empowered to sell or lease them at what may be an enhanced value" (Laws of England—Halsbury VI 25.)

The principle of recoupment is well-known here also and has been apparently provided for in the Bombay City Improvement Act of 1898 and the Calcutta Municipal Act of 1899 section 357 (?), both of which have been in operation for many years.

The latter Act gives the Corporation *wider powers* than are claimed here for the Trustees.

The question is whether the power of taking land for recoupment has been given in the Calcutta Improvement Act (V of 1911 B. C.). Does it appear to be the intention of the Act that the public body of Trustees are to be allowed to re-imburse themselves, the cost of improvement? It is possible though it may not be likely, that what has been given under the Bombay Act and the Calcutta Municipal Act has been withheld here. I do not refer to the Bombay Improvement Act on the question of the construction of the Calcutta Improvement Act, but for the purpose of negating the charge made against the Act of its being of an unusual arbitrary and offensive character if it be construed to include the principle of recoupment. That principle is common enough and far enough. Whether it exists in the provisions of the Act under discussion is another question. We have been told

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that a frontage tax was negated. This is not against a power of recoupment having been given. For the former is a wider power applicable to every property fronting the improved area, whereas recoupment gives an option to the Trustees to acquire it or not according to the circumstances. It is obvious that the city cannot be improved except at a *cost*. It is argued before us that taxes and contributions provided for by the Act are insufficient to provide the funds necessary for improvement unless the principle of recoupment be allowed. Whilst this is *prima facie* possible, we must still look to see whether the power has in fact been given. This is a question of construction. Before dealing with the sections I may dispose of another apparent objection. It is equitable that those whose premises have been benefited by the improvement should contribute to it; and the application of this principle is subject to scrutiny and sanctions which guard against any misuse of powers.

In my opinion the solution of the question before us depends in the main on the construction of sections 42 and 69. Subsidiarily sections 58, 78, 81, 122 are of importance. The Preamble states the object of the Act to be to make provision for the improvement and expansion of Calcutta. This is the object of the Act generally stated. It there mentions particular ways in which this general object is given effect to, such as opening of congested areas, altering streets, acquiring lands, and "otherwise as hereinafter appearing." We must distinguish between the direct objects of the Act and the means by which they are to be given effect to. The object is to improve Calcutta. But to improve it money is needed, and the raising of money for that purpose is a means. The Preamble then proceeds to say that it is expedient that a Board of Trustees should be constituted and invested with special powers for carrying out the objects of the Act. One of such powers is the power to acquire land for the execution of the proposed scheme (S. 41.) Every improvement scheme must provide for this. Another power (S. 42) is an optional one. Such scheme may provide for the acquisition by Board of Trustees of "any land in the area comprised in the scheme which will in their opinion be affected by the execution of scheme." The question turns firstly on the meaning of the word "affected." It is obvious that the land so affected is different from land required for the execution of the Scheme. Thus land may be taken outside the Improvement Scheme. The improvement brought about by the execution of the latter is the cause of the effect produced on the "affected" land.

It was held in *Trustees for The Improvement of Calcutta v.*

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Chandra Kanta Ghose (1), that the word "affected" does not mean "beneficially affected or improved in value," nor does it mean "prejudicially affected or impaired in value," but signifies "acted upon physically or materially." It is difficult however to conceive of a case in which land is neither beneficially nor prejudicially affected in value. Perhaps what was meant to be said is that it is not sufficient to show that the land is affected in value, but that it is affected physically or materially must also be shewn. But I am unable to see any ground which justifies us in reading into the section words which are not there. The Act says nothing about physical or material. It says "affected." This word must be given its plain and natural meaning, and that is "affected" howsoever it may be. In my opinion "affected" means affected and not merely physically affected, affected in value prejudicially or beneficially or so forth. If it is affected in any way, it is "affected." If it is beneficially affected, it is affected and the question arises for what purposes and how the Trustees may acquire it. The next question is whether lands mentioned in section 42 can be acquired both by agreement under section 68 and compulsorily under section 69, or whether as Mookerjee and Cuming JJ. have held, we are again to interpret a term used in its general sense in a particular sense. It has been held in the judgment cited that there can be no compulsory acquisition in respect of land dealt with in section 42 (a). This conclusion is based on the ground that section 69 authorises the Board to compulsorily acquire land "for carrying out any of the purposes of this Act." It is then said that as acquisition for the purpose of recoupment is not mentioned in the Preamble, it is not a purpose, or a carrying out of a purpose, of the Act. As I have said, we must distinguish between an improvement and the means by which the improvement is effected. Recoupment is a means. The Preamble is not concerned with the means. It merely states some of the general objects which are to be carried out by the means dealt with in the sections. It mentions acquiring land for certain objects of improvement. It does not mention the acquisition of land that it may be sold at a profit. It mentions the first because that is one of the objects of the Act: it does not specifically mention the second because it is a means, merely stating in general way that the Trustees were invested with special powers (to be found in the sections) for carrying out the objects of the Act. I asked during the course of the argument whether there is any Act in this country or elsewhere in which recoupment is allowed and in which recoupment

(1) (1916) I.L. R. 44 Calc. 219 (233); 24 C. L. J. 246.

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is directly mentioned in the Preamble, and none was produced. On the contrary the word recoupment does not appear in any Act. We have further to see what are the express provisions in the body of the Act. It is and must be admitted that whatever be the meaning of the term "affected" in section 42 acquisition of land there mentioned is declared to be part of the Improvement scheme. How then can it be said that the acquisition of land, which is part of the Improvement scheme, is not for the carrying out of a purpose of the Act. As a matter of fact the contention that there cannot be compulsory acquisition under section 69 of land mentioned in section 42 (a) has been abandoned on the hearing before us, it being said that land may be acquired compulsorily or by agreement in respect of the matters mentioned in that section.

The words in Sec. 69 are not only "for the purposes of this Act" but "for carrying out any of the purposes of the Act," that is, land may be compulsorily acquired both for the ultimate objects of the Act namely, the improvement and expansion of Calcutta, and also as the sanctioned means whereby such improvement can (and as alleged can only) be effected.

What then is the object of acquiring land under section 69 combined with section 42? Even if recoupment can be included in the words "for the carrying out of the purposes of the Act," it must be shown that it is in fact so included, and that under section 42 acquisition may be made for such purpose.

As I have already said "affected" includes both beneficially and prejudicially affected in value by the execution of the Scheme of Improvement. If the land sought to be acquired is likely to be injuriously affected by the execution of the proposed scheme, the land may be acquired at the market price, in which case the prospective loss will, if it occurs, fall on the Trustees. The latter are not bound to take up this or any other affected land. Ordinarily however adjoining land will be beneficially affected by the adjoining improvement. In that case, if the Trustees elect to acquire it, they acquire it at the market price and take the chance of prospective profit. They get this profit in one of two ways, either by allowing the owner to apply under section 78 for exemption of acquisition on payment of a sum to be fixed by the Board, or they may sell the land under section 81 subject (with certain qualifications) to a right of pre-emption in the owner. Section 78 is of great importance. It is sought to be explained away by saying that it applies to surplus lands, *i. e.*, land which was originally acquired for the execution of the scheme but which was subsequently found not to be so required.

The section does not say this, but "which is not required." But let us assume for the moment this construction and see what follows. The section contemplates an application by the owner to the Board requesting that the acquisition should be abandoned in consideration of the payment by him of a sum to be fixed by the Board. Why on the construction put forward by the appellant should the owner pay anything at all? His land is (say) taken by mistake and is found not wanted, and yet he is to be made to pay for the privilege of getting back his own land which, on a more correct estimate of what was required, should never have been taken from him. Learned counsel for the appellant was unable to say anything more about this than that Government had put this "hardship" on his client and that he had to bear it. It is more reasonable to suppose that instead of imposing unnecessary hardships, the legislature had in view a useful purpose, namely, recoupment. Moreover, the words of section 78 show that it does not apply to surplus lands under the improvement, because the scheme has not been commenced, and therefore no one is in a position to say what are surplus lands: and because the payment by the owner negatives the idea that the lands here referred to are surplus lands. If they were, there is no reason why the owner should pay for getting back lands which on the hypothesis belong to him.

I agree with Greaves J. that we must read "affected" as meaning affected and not as qualified by terms which do not appear in the Act. I agree with him in holding that "affected" means affected in any way either prejudicially to the owner of the lands, or beneficially affected in the opinion of the Board, that is, enhanced in value by the improvement scheme and that recoupment by compulsory acquisition has been provided for by the Act. There is no question but that the land in suit was "affected" so as to justify its acquisition by the Board, whether we limit the term as the appellant suggests, or give it its full meaning as I think should be done. As, however, I am in disagreement with the decision in *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), in that it holds that Act V of 1911 B.C. does not allow the compulsory acquisition of land for recoupment, I agree that the question, whether it is good law or not, should be referred to a Full Bench in terms of the Chief Justice's judgment.

Chitty, J.—This is an appeal from the decree of Greaves J. in a suit brought by Mani Lall Sing against the Trustees for the Improvement of Calcutta and the Land Acquisition Collector to restrain them from acquiring the plaintiff's premises, No. 10 Halliday Street, under

(1) (1916) I. L. R. 44 Calc. 219; 24 C. L. J. 246.

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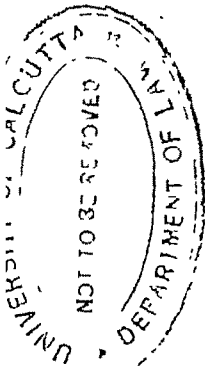
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the Calcutta Improvement Act, V of 1911 (B.C.). The learned Judge dismissed the plaintiff's suit finding on issue (5) that the lands in suit are required for the purposes of the Act and that recoupment is one of such purposes. In the view that he took it was unnecessary to decide the other issues.

I agree with the learned Chief Justice and Woodroffe J. that the decision appealed from is correct, and that this appeal ought to be dismissed. But as this involved disagreement with the decision of a Division Bench of this Court in *trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1) and consequently a reference to a Full Bench, I will state briefly the reasons for my decision.

The question for determination is whether the principle of recoupment is contemplated by the Calcutta Improvement Act. I should have preferred not to use the word "purposes" in issue (5) as a distinction might be drawn between "purposes" meaning the "objects" of the Act and "purposes" denoting the means by which those objects are to be attained. The word "purposes" is no doubt wide enough to cover both meanings. Thus the raising of loans by the Board which is specifically provided for by the Act may be said to be a purpose of the Act though it is strictly one of the means by which the objects of the Act are to be carried out. It may be conceded that the word "recoupment" or indeed any synonymous expression finds no place either in the preamble or in the body of this Act. Our attention has not been drawn to any Statute or Act in which it does occur, though many such Statutes and Acts contemplate "recoupment," which is a well-recognised principle in Town Improvement. So far as the preamble is concerned, it is expressed in very general terms and the only object or purpose of the Act there specified is "to make provision for the improvement and expansion of Calcutta" those words are followed by an enumeration of various methods, by which the improvement and expansion are to be affected, and the sentence ends "and otherwise" (i.e., in other ways) "as hereinafter appearing." These last words in my opinion clearly refer back to the various participles preceded and governed by the preposition "by." The second clause provides for the constitution of a Board of Trustees and for investing them with special powers for carrying out the objects of the Act. In my opinion, there is no force in the contention that the principle of recoupment finds no place in the preamble as a purpose or object of the Act. It is not to be expected that it should. We have to see whether it is one of the special powers with which the Board is invested. To see that we

(1) (1916) I. L. R. 44 Calc. 219 ; 24 C. L. J. 246.





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look into the Act itself. I agree that it must not be a matter of vague implication. It must be found there in provisions as to the meaning of which there can be no doubt.

The most important section is section 42, which deals with matters which *may* be provided for in improvement schemes, section 41 having dealt with matters which *must* be provided for. Section 42 runs:—"Any improvement scheme may provide for (a) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme." I agree with Greaves J., that the decision of this case rests upon the meaning to be given to the word "affected." The arguments of counsel on both sides were exhaustive and proceeded along somewhat devious paths, but all led us back to the simple question, what is the meaning to be placed on the word "affected." The learned Judges, who decided *Chandra Kanta Ghose's case* (1) expressed their opinion that in section 42 (a) it means neither "beneficially affected or improved in value" nor "prejudicially affected or impaired in value" but signifies "acted upon physically or materially." I am not sure that I understand their meaning. It may be that they meant that it does not necessarily signify affected in value. If they meant that it can have no reference to value I am unable to agree. For the appellant it was argued that it certainly had no reference to value, but to injurious affection by reason of some interference with the owner's rights. No good reason was given for reading the word in so restricted a sense. It is noteworthy that when the legislature intended so to use it they add the adverb, see section 23 (1) (4) of the Land Acquisition Act, 1894, where the words are "injuriously affecting." I cannot see why the word "affected" should not be given its ordinary and natural meaning, and signify "affected" in any way, beneficially or injuriously, physically or materially, or otherwise howsoever. It seems to me that if land be "affected" at all by the execution of a scheme it must be affected for better or worse. There can be no middle course, for then it would not be affected at all.

If the word be so construed section 42 (a) clearly authorises the Board to include in a scheme the acquisition of any land within the given area which will in their opinion be affected by the execution of the scheme. Whether it will be so affected or not, the Board are the sole Judges, though their scheme is of course dependent on the sanction of the Local Government. I must confess that I was unable to appreciate the force of the argument that section 42 (a) does not

(1) (1916) I L. R. 44 Calc. 219; 24 C. L. J. 246.

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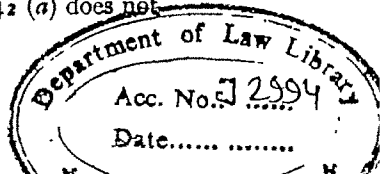
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authorise compulsory acquisition; that that can only be effected under section 69; that section 69 only empowers the Board, with the previous sanction of the Local Government, to acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of this Act; and that the acquisition of land provided for under section 42 (a) is not a purpose of the Act. This appears to be the effect of the judgment in *Chandra Kanta Ghose's case* (1), though I understood the learned Advocate-General to admit that for some purposes at any rate compulsory powers might be exercised under section 42 (a). It is difficult to see why a distinction should be drawn between section 42 (a) and section 42 (b), (c) and (d) which may certainly be included in purposes of the Act. In my opinion acquisition of land provided for under section 42 (a) is just as much a purpose of the Act, though a different one, as the acquisition of land provided for under section 41 as being in the opinion of the Board required for the execution of a scheme. I understood it to be conceded by the learned counsel for the appellant that the Board could under section 68 acquire land by purchase or lease for purposes of recoupment. The learned Judges who decided *Chandra Kanta Ghose's case* (1) seem to have been of the same opinion, for they say:—"The section (*i.e.*, section 42) is at best an enabling provision; it gives no power of compulsory acquisition, though it may possibly authorise the Board to acquire land by private agreement." But section 42 is quite general in its terms and makes no distinction between the two forms of acquisition, by agreement and compulsory, which are recognised by the Act. An attempt was made to draw a distinction between acquisition by agreement under section 68 and compulsory acquisition under section 69 beyond the obvious distinction between agreement and compulsion therein appearing. I do not think that there is any other distinction. The phraseology of the two sections is slightly different, but their meaning is the same. Under section 68 the Board may make any agreement for the purchase or lease "of any land which they are authorised to acquire." That must mean "authorised to acquire" under this Act. They can therefore under section 68 only purchase or lease land for carrying out any of the purposes of this Act, which are the words used in section 69. I am of opinion that the acquisition of land provided for by section 42 (a) is for carrying out the purposes of the Act, and that such acquisition, when the scheme has been approved by the Local Government, can be put through under the provisions of either section 68 or section 69 as the case may be.

(1) (1916) I. L. R. 44 Calc. 219; 24 C. L. J. 246

That the Board can acquire land for purpose of recoupment is in my opinion made clear by the provisions of sections 78 to 81. Section 78 is specially important, as in my opinion it can refer to nothing else. It was argued that it may refer to surplus lands, *i.e.*, to lands which have been included in a scheme but have been found to be unnecessary for its execution. The words of the section, however, are "land.....which is not required for the execution of the scheme," not "which has been found to be unnecessary" for such execution. No satisfactory answer was given by the appellant's counsel to the question put more than once, why, if a man's land has been taken and is to be given back as not required, should the unfortunate owner be made to pay to get it back. If the section referred to the abandonment of acquisition of surplus lands, it would in my opinion be in irreconcilable conflict with section 48 of the Land Acquisition Act, which must be read as incorporated in this Act. Further, the time, before which an application under section 78 must be made, *i.e.*, before the time fixed by the Collector under section 9 of the Land Acquisition Act, shows that it cannot possibly refer to surplus lands. In *Chandra Kanta Ghose's case* (1) it is suggested that section 78 may come into play where land which was originally intended to be acquired as necessary for the execution of the scheme may turn out to be not actually required by reason of an alteration in the scheme under section 50 or by reason of some mistake in the original scheme itself. It is difficult to see how any such mistake could arise having regard to the various stages through which a scheme must pass before it is finally sanctioned. Nor is it reasonable to suppose that an elaborate section such as section 78 would be framed to meet a contingency which was not and could not be contemplated by the Act. But I cannot see how section 78 can apply in either of these two contingencies. If a scheme is altered or a mistake discovered, it must be before the land has been acquired. In that case the owner's land is still his own. Section 78 is only to be employed on the owner's application, and the question above referred to is again pertinent, why should he have to pay for retaining his own land which the Board do not require. It was argued that if section 78 refers to land acquired for purposes of recoupment, then under section 80 the Board would be able to repeat the process *ad infinitum*. This is clearly not so. That section merely provides that land, for which an exemption fee has been paid under section 78, is not thereby excluded from a fresh declaration under section 6 of the Land Acquisition Act.

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Lastly the provision in Sec. 81 (a) (b) giving the owner of land a right of pre-emption clearly denotes that the land has been taken for purposes of recoupment and not as required for the execution of a scheme. It provides for the return of land to the owner at a price to be fixed by the Board, when that land has been acquired, while Sec. 78 provides for such return at an earlier stage of the acquisition proceedings. I do not think that the sections in chapter VI, Finance Accounts, have much bearing on the question before the Court, but Sec. 122 provides for the crediting to capital account of all sums that can be received by the Board in respect of the sale of land, from whatever source it is derived [see section 122 (a), (c) and (d)]. I entirely agree with what Woodroffe J., has said with regard to the alleged arbitrary nature of the Act. It appears to be far less arbitrary than the Land Acquisition Act which has been in force, with modifications, for nearly fifty years, or the Calcutta Municipal Act, 1899, with which the people of Calcutta are equally familiar. In this particular case although Greaves J., actually decided issue (5) only and on that decision dismissed the suit, his judgment shows that he considered the land here in question to be "affected" by the execution of the Scheme. [Issue (6)]. There is no doubt on the facts, which are not in dispute, that this is so, as two small portions have been cut off for rounding off the corners of Haliday Street and the streets running into it. To this extent the case is distinguishable from *Chandra Kanta Ghose's case* (1). The question of law however in both cases is the same, and, as we are in disagreement with the decision in that case, I agree that the question should be referred to a Full Bench.

A question was raised whether the Land Acquisition Collector was a necessary or proper party to this suit. In my opinion he was not. In any event, as he is sued in his official capacity, and the allegation in the plaint as amended is made against him in that capacity, the party, if any, to be added was the Secretary of State for India in Council.

Hon. Mr. B. C. Mitter (Offg. Advocate-General) (with him *Mr. S. C. Roy*) for the Appellant.

Mr. S. R. Das (Offg. Standing Counsel) (with him *Messrs. Langford James* and *A. Sinha*) for the Respondent (Calcutta Improvement Trust.)

Mr. B. C. Mitter—The matter is not properly before the Full Bench. This case was clearly distinguishable from *Chandra Kanta's case* (1) : Referred to portions of the judgments of Chitty J. and Woodroffe J. No difference of opinion is as yet present which can justify a reference to a Full Bench : Referred to *Prasanna v. Kailash* (2).

(1) (1916) 24 C. L. J. 246. (2) (1867) B. L. R. Sup. Vol. 759 (763).

Power to acquire land for purposes of recoupment must be given either expressly or by necessary implication: There is no express power to acquire land which is not needed for any of the purposes mentioned in the Act. As to *purposes of the Act*, see Preamble: Beale's Legal Interpretation, p. 255. When the purposes have been set out in the preamble, no question of implication arises. Recoupment is not one of the purposes of the Act. Section 69 deals with compulsory acquisition. But it must be for one of the purposes of the Act. Refers to *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1). Acquisition may be by agreement or may be compulsory.

When the Board are authorised to acquire, they may acquire land by agreement under section 68. The words "for the purposes of the Act" do not appear in section 68 but are in section 69.

The respondents rely on sections 42 and 78, and say that these sections raise a necessary implication. That is not so. 'Implication' means necessary implication. *Dickson v. Pape* (2) and Beale p 590. "The necessity for section 42 is evident. For instance, under section 49 of the Land Acquisition Act, the Improvement Trusts may be compelled to acquire the whole of a house or building. See also section 49 Cl. (2) of the same Act. In such cases a fresh declaration under section 6 of the Land Acquisition Act would then become necessary under section 50 of the Improvement Act. The whole procedure under this Act would have to be gone through. *If however the land or house in question is included in the scheme in anticipation, this becomes unnecessary.* The existence of a section like section 42 can easily be explained by a case like this. If so, where is the *necessary* implication that section 42 gives them power to acquire?"

'Affected' in section 42 does not refer to value: *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1). It means physical interference with any right which the owner is entitled to exercise in connection with any property: Its primary meaning is *injuriously affected*: ordinarily, if injuriously affected, the value will go down. But this does not necessarily follow; e. g. (a). If I had a right of way to my house, and a new street is opened, I may lose some right, but the value of my land may increase. (b) Lowering the land by raising a street. Value of land may increase, but loss may accrue because the land becomes less accessible. Rise or fall in the value is not important. For definition of 'land,' see section 3,

(1) (1916) 24 C. L. J. 246; I. L. R. 44 Calc. 219.

(2) (1845) 7 Ir. L. R. 107 (123).

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Land Acquisition Act and section 2 of Improvement Act. The word 'affected' occurs there in interests 'affecting' land. There it means injuriously affecting lands. (c) *Drainage*: A new street is opened and sewered. The house may be affected or damaged, yet its value may go up because of the street. Increase in the value of the land is not to be taken into account, for then the statute should have said so. See Bombay Improvement Act (IV of 1898 Bombay.) section 49. But in Calcutta, this is not so. There is no such provision. On the other hand, increase in the value goes to the owner. That is the policy of the Calcutta Act. See Land Acquisition Act section 24, *sixthly*. This is not repealed in Calcutta. Legislature does not desire to confiscate the property or to encroach upon the rights of persons: *Commissioners v. Logan* (1). In England also, specific provision is necessary, if the betterment principle is to be applied. Simply because a land is bettered, it does not follow it should contribute: Halsbury's Laws of England, Vol. VI. p. 42. Under the Lands Clauses Act, enhanced value cannot be taken into account. Refers to section 38(8) of Housing of Working Classes Act and section 58 of the Housing, Town Planning Act, 1909. Where any property is increased in value, half the increase goes to the public authority. There is no such provision here. In fact, the statute does not contemplate that money should be recovered on the principle of *betterment*. If that had been so, one would expect (a) some such provision as in section 49 of the Bombay Act; (b) repeal of section 24 (*sixthly*) of the Land Acquisition Act; and (c) that the Government would require the Board to state what money it is going to spend on acquisition of land and how much will be subsequently recouped. The section does not even want a statement specifying the land proposed to be acquired for the purposes of recoupment. See Bombay Act, section 28(c).

Section 47(2)(a) required the Board to forward an estimate only of the *cost of executing the scheme*. This does not include the cost of acquiring land or the amount which may be recouped.

Section 123(a) shows that *execution* of the *scheme* refers to the engineering process, that is, the construction of the works. *Execution of the scheme* refers to the process to be gone through in order to complete the scheme. See section 41 "required for the execution of the scheme."

'Affected by the execution of the scheme,' in section 42 therefore, means, affected by the construction of the works. This effect

(1) (1903) A. C. 355.

must take place because of the construction, and as a rule, during the completion of the scheme. The respondents want to read these words to mean "affected by the scheme when completed." These arguments show that there is no necessary implication under section 42, giving the Improvement Trust power to acquire land for recoupment purposes.

Notice is to be given under section 45. But this does not concern the present question at all.

Calcutta Municipal Act, section 357 is against the contention of the Board, because it shows that when power to acquire land for recoupment is given, it is given expressly.

As to 'physically affected,' see Stroud's Judicial Dictionary, Vol. I. p. 51.

Section 78.—'Is not required.' 'Is' means *at present*. It refers to a case of land which is no longer required. Section 48 of the Land Acquisition Act does not help the other side. After *declaration* under section 6 of this Act, Government has every right to proceed to acquire it. If the land ceases to be necessary there is no compulsion on the Government to return it to the owner. The owner gets bare market value. In order to get back land which was his, he may be willing to pay something for it. As soon as the declaration is made, the Trust acquires some interest; otherwise they cannot enter into an agreement. Suppose a scheme is altered, as the Board have the power to alter it even after sanction, some land may become superfluous. As to 'superfluous land,' see *The Directors of Great Western Railway Co. v. May* (1). Section 78 must refer to 'surplus land,' under section 41 which is "not required." At any rate, section 78 must refer at least to land which was at one time necessary but subsequently has become superfluous. If that is so, it cannot be said that this section by *necessary implication* empowers the Board to compulsorily acquire land for recoupment purposes.

Land may be purchased out of loans. Section 89 mentions this. Interest as well as *sinking fund* for these loans are to be paid out of the revenue, which is made up of taxes. Section 122(d) shows that land may be purchased out of advances from the loan. Cl. (h) shows that the surplus of the revenue goes into the capital.

There is nothing in the point that section 78 is mentioned first in section 122 (a). The enumeration is *seriatim*. All

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this shows that the legislature never contemplated recoupment as an important source of income. The elaborate provisions about loans and sinking fund also show that the legislature adopted the correct and equitable procedure of distributing the cost of improvement of a town like Calcutta over a long period. Principle of recoupment throws the cost on the present owners.

If extra land is to be taken, such power should be given expressly as in section 357 of the Calcutta Municipal Act, section 204 of Bengal Act II of 1888 (one hundred feet on each side of the street), section 158 of Madras Act IV of 1884, section 59 of Central Provinces Act No. XVI of 1903 and section 85 of Punjab Act XX of 1891. The legislature never leaves a power like this to be spelt out, as the Improvement Trust are trying to do.

Recoupment is in the nature of a tax, yet it finds no place in the financial part of the Act.

Section 42 (a) does not create any right to acquire land. See *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghosh*, (1).

In case of ambiguity, strict construction should be made: See Cripps pp. 21, 22; *Webb v. Manchester and Leeds Railway Co.* (2).

Under section 6 of the Land Acquisition Act, land is needed for a public purpose: *Ezra v. The Secretary of State* (3). Halsbury's Laws of England, Vol. VI., p. 25.

We do not admit that under the Bombay Improvement Act, recoupment is allowed. Refers to *Galloway v. Mayor of London* (4).

Mr. S. R. Das for the Respondent: The Improvement Act comprises (a) the main object; (b) ways in which it is to be carried out; and (c) means for attaining it. The 'means' is as much a purpose as the object. The preamble deals with (a) fully and with (b) and (c) not fully. Provisions are made by the Act for constitution of the Board or borrowing of money. These are means and are purposes of the Act. 'And for' in preamble means "and acquire land for rehousing"; 'and otherwise' means by other means. Purposes in the preamble are not exhaustive; for example, *building sites* in section 39(a) is not in the preamble; also 'facility for conservancies' in section 39(d) is not there.

The Board (under Preamble para 2) have to carry out the *objects* of the Act.

(1) (1916) 24 C. L. J. 246; I. L. R. 44 Calc. 219 (252).

(2) (1839) 4 My. and Cr. 116.

(3) (1902) I. L. R. 30 Calc. 36 (42).

(4) (1866) L. R. 1 H. L. 34.

[Fletcher J.—Your argument is that the Act empowers the Board to throw the cost of improvement on the land improved.]

If you fix an area after the resolution under section 39, you cannot say the whole area is improved. If it were so, it would be meaningless to say “which in the opinion of the Board is affected,” as appears in section 42.

Carrying out every scheme which government sanctions is carrying out one of the purposes of the Act.

[Fletcher, J:—Provided land has been properly included in the scheme.]

But the scheme is sanctioned by the Government after it has full knowledge of the particulars.

When Government sanctions a scheme, it imposes a statutory duty to execute it and the first step is to acquire land. Therefore sections 48 and 49 and not sections 68 and 69 give the power to acquire land. Sections 68 and 69 are merely methods of acquiring. They do not give us the power.

I do not depend on necessary implication. There are express provisions. Section 81 shows that any land can be sold, so that I can sell and make a profit.

‘Is not required’ in section 78 refers to the time of sanction. It is against the principle of natural justice that in order to get back his own land the owner has to pay instead of getting compensation. Section 78 is not for occasional surplus land. The procedure is elaborate. How is the owner to know of alteration of scheme, before he applies? If lands have ceased to be required after declaration, for what purposes are they allowed to go on to acquire? Why are they allowed to go on? It is not needed. It must be for recoupment.

If the words were “by the execution of the works” instead of “by the execution of the scheme,” there would have been a great difference. The Board are not likely to include land which are likely to be injuriously affected. They are men of business. ‘*Execution of the scheme*’ refers to *completion of the scheme i. e.,* the scheme having been fully completed.

Mr. Langford James followed.

Mr. B. C. Mitter in reply: The object or purpose of the Act is to improve Calcutta in certain definite ways, for instance, by opening up; by laying out etc. Means have to be provided for, but they are not the purposes of the Act: e.g. Provisions for penalties. Provisions are not purposes. Section 169 is a provision and not a purpose of the Act.

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'For the said purposes' in the preamble, cannot refer to ways and means. The improvement schemes are different from rehousing schemes. See, definitions.

'And for' in the preamble means 'and make provision for.' Such provision is made, for instance, in section 52.

If you read 'other means' for improving Calcutta then there would be many provisions which would not come under that, e.g. Legal Proceedings and Penalties.

"Providing building sites and facilities for conservancy" are included in "laying out and altering street" in the preamble. Under section 39 the results to be aimed at in *laying out streets* are mentioned there as four in number. If *purpose* and *objects* are not identical, then how can the Board acquire land under section 69 to carry out the purposes of the Act.

Even if there be no recoupment, the owner does not keep the whole of the increment in the value. (a) He pays to the Board a permanent annual contribution of 2 per cent of the increased annual value of the land itself. (b) If he builds on the said land, he again pays 2 per cent on the annual value of the building, although the Improvement Trust does not do anything further. He goes on paying this long after the Improvement Trust have completed the works. (c) Even if the owner had kept to himself the whole of the increased value, he would not have done anything wrong. Policy of the law is that the increase in the value goes to the owner. Section 24 (sixthly) of the Land Acquisition Act has not been repealed here, but it has been repealed in Bombay.

The other side's reading of 'affected' is 'improved.' But this becomes absurd in the case of a general improvement scheme. The whole area is *unhealthy* at first. Then it is improved. How can it be said that only one position of the area has been affected or improved.

'Properly included' means (a) land *itself* must be affected. 'Land' includes rents arising out of it: *Raja Shyam Chandra Mardaraj Harichandan Raj Narain v. The Secretary of State for India in Council* (1). (b) It must be *affected* whatever that means. (c) It must be affected by the *execution of the works* and not by the subsequent uses. If acquisition is desired, the land must be taken for one of the purposes of the Act.

Section 81 refers to surplus land or land which has become surplus. *The Directors etc. of Great Western Railway Co. v. May* (2). Sale does not always bring profit.

(1) (1908) 7 C. L. J. 445; I. L. R. 35 Calc. 525. (2) (1874) L. R. 7 H. L. 283.

It is only if the Board abandons acquisition that owner gets compensation. But they abandon acquisition, only if the owner applies. The owner does not apply unless it pays him to take back the land even on payment.

Surplus after completion is dealt with under section 81.

Schemes may be modified by Government (section 48) or by the Board (sections 47 and 50). Persons interested are bound to come to know of this.

After declaration, no question of purpose arises.

C. A. V.

The following judgments were delivered :

Fletcher, J.—The question referred to the Full Bench for determination is as follows :—

"Whether the case of the *Trustees for Improvement of Calcutta v. Chandra Kanta Ghose*, (1) in so far as it holds that Act V of 1911 (B.C.) does not authorize the Board of Trustees to acquire land compulsorily for purposes of "recoupment" i.e. by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78 was rightly decided."

The suit out of which the present reference arises was instituted on the Original Side of this Court by the plaintiff as the owner of the premises known as No. 10 Halliday Street against the Trustees for the Improvement of Calcutta and the Land Acquisition Collector for the purpose of obtaining an injunction to restrain the defendants from acquiring the said premises or doing any acts in furtherance thereof. From the statement given in the opinion of the learned Chief Justice in the Order of Reference it appears that No. 10 Halliday Street lies on the west side of Halliday Street, the widening of which formed the basis of a Street Improvement Scheme framed by the Trustees and known as Scheme No. VII A. There was some discussion during the argument before the referring Judges as to how much of No. 10 Halliday Street had been taken for the actual street widening. It was however finally agreed between the counsel engaged in the appeal that the strips of land to the north and south of No. 10 which had been taken for the purpose of widening Tara Chand Dutt Street and Zakaria Street had been taken under another scheme or schemes, and that only the portions of No. 10 required for rounding off the corners formed by the junction of these two streets with Halliday Street had been taken in

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scheme VII.-A so far as the actual widening of Halliday Street was concerned. The remainder of No. 10 Halliday Street the Trustees contend they are entitled to acquire compulsorily under their improvement scheme as land—"which will in their opinion be affected by the execution of the scheme." The Trustees admit that the remainder of No. 10 Halliday Street is being acquired by them for the purpose of what is called "recoupment." Greaves J. dismissed the plaintiff's suit on the 17th of July 1916. Against that judgment the appeal out of which the present reference arises was preferred. On the 22nd of August 1916, Mookerjee and Cuming JJ. sitting as a Division Bench delivered judgment in the case of the *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghosh*, (1) in an appeal against a decree of the Subordinate Judge of the 24th Pergannahs. This is the judgment referred to in the order of reference and in that judgment the learned Judges held that the Trustees had no power under Act V of 1911 (B.C.) to acquire land compulsorily for the purpose of "recoupment." The appeal against the judgment of Greaves J. came on for hearing before a Bench consisting of Sanderson C J. and Woodroffe and Chitty JJ. and they not being in accord with the decision of Mookerjee and Cuming JJ. made the present reference.

A point has been raised *in limine* that we ought not to decide the question referred to us as the point does not "arise" for determination within the meaning of the rules of this Court in relation to references to a Full Bench. The foundation for this argument is certain observations made by the learned referring Judges. There is no substance in this argument. The learned referring Judges state that the question as to the correctness of the decision of Mookerjee and Cuming JJ. does "arise" in the appeal in which this reference is made and it is obvious it does arise with regard to the whole of No. 10 Halliday street except the small portions taken for rounding off the corners of the road. Further this reference arises out of a regular appeal. No case has been cited to us of a reference to a Full Bench in a regular appeal where the Full Bench has refused to answer the question referred. The case reported in the Bengal Law Reports (Full Bench Rulings)* which was relied on by the Advocate-General when looked at is not an authority for his proposition. For it appears that in that case it was only the minority of the Bench that was of opinion that the question ought not to be answered—the majority holding on the

(1) (1916) I. L. R. 44 Calc. 219; 24 C. L. J. 246.

* *Prasanno v. Kaylash* (1867) B. L. R. Sup. F. B. Rul. 759; 8 W. R. 428.

other hand that the question referred must be answered. It is also to be observed that on the rules relating to references to a Full Bench this case might in certain circumstances be heard by a Division Bench other than that which made the present reference and in that event if we were to decline to answer the question that other Bench might send the case back on a fresh order of reference. I am clearly of opinion that we must determine the question referred to us.

Now the question referred must be determined on the construction of the provisions of Act V of 1911 (B.C.). But before considering the section of the Act I should like to make clear what is understood by the terms "recoupment" and "betterment."

This is best shown by the Report in 1894 of a Select Committee of the House of Lords on Town Improvement (Betterment). That committee had before them "witnesses who have had experience in the actual working of betterment charges in various forms and they have also taken the evidence of other experienced witnesses and of gentlemen who have written on the subject." They reported (paragraph 3(1) of the report). "The principle of betterment—in other words the principle that persons whose property has clearly been increased in market value by an improvement effected by local authorities should specially contribute to the cost of the improvement is not in itself unjust and such persons can equitably be required to do so. But the effect of a public work in raising the value of neighbouring lands is shown by experience to be uncertain. Whether in any particular case it is possible for a valuer to pronounce that such an effect has been produced by the completion of any public work is a point upon which the evidence of eminent valuers differs greatly."

[Paragraph 3 (10)].—"The Committee have received evidence upon what has been called "recoupment" that is to say powers given to a municipal or other public body to take land beyond what is necessary for the actual execution of the work so that some part at least of the improved value may be secured by the improving public body in ease of the burden on the rate-payers. Some evidence was given by persons who had actual experience of the operations of such a system the general effect of which was that it had not proved successful but the Committee are not satisfied that it has even been tried under circumstances calculated to make it successful inasmuch as no sufficient power has ever yet been given to local authorities to become possessed of the improved properties without

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buying out all the trade interests, a course which is inevitably attended with wasteful and extravagant expenditure."

I have set out these portions of the Report of the select Committee as I feel, with all respect to the learned Judges who decided the case of *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose*(1), have not kept clearly in view what is the object of "recoupment" and "betterment." The vesting of a local authority with power to acquire land for the purpose of "recoupment" cannot I think be described at the present day as "vesting the Board with arbitrary and unlimited power of interference with private rights."

The question therefore as to whether or not a particular statute authorizes "recoupment" or "betterment" must be determined solely on a consideration of the terms of the statute, and if it does so authorize it must also be determined whether compulsory powers of acquisition have been conferred for carrying into effect such purposes.

Mookerjee and Cuming JJ. in their judgment proceed in the first instance to consider the preamble of Act V of 1911 and observe that "recoupment" is not mentioned as one of the purposes of the Act. But one would not expect to find it there. The preamble usually only mentions the general object and intention of the legislature in passing the enactment. Further it is well established that the preamble cannot restrict the enacting part of an Act though it may be referred to for the purpose of solving an ambiguity.

Mookerjee and Cuming JJ. in their judgment place considerable stress on the first paragraph in the preamble. Their reading of that paragraph is not however the literal and grammatical reading of it. The construction those learned Judges put on the paragraph was that the objects of the Act are :

A.—The improvement and expansion of Calcutta.

B.—The re-housing of the working classes displaced by schemes.

The learned Judges, however, remark that "the words 'and otherwise hereinafter appearing' at the end of the paragraph are by no means easy to construe, with what precedes." The plain reading of the paragraph is that the object is the improvement and expansion of Calcutta by the means specified "and otherwise as hereinafter appearing." The preamble, I think, affords us little assistance in the present case only its terms cannot be used as in any way negating the power of recoupment claimed.

Turning then to the sections of the Act which I think are material.

(1) (1916) I. L. R. 44 Calc. 219; 24 C. L. J. 246.

"Improvement Scheme" is defined by section 2 as meaning a general improvement scheme or a street scheme or both.

"The duty" of carrying out the provisions of the Act, subject to the conditions and limitations contained therein is by section 3 vested in a Board to be called "The Trustees for the Improvement of Calcutta."

Chapter III of the Act is headed Improvement Schemes and Re-housing Schemes. Sections 36, 37, and 38 deal with general improvement schemes.

Then comes an important section 39 in the following terms :—

"Whenever the Board are of opinion that for the purposes of—

(a) providing building sites, or

(b) creating new or improving existing means of communication and facilities for traffic, or

(c) affording better facilities for conservancy it is expedient to lay out new streets (including bridges causeways and culverts) the Board may pass a resolution to that effect and shall proceed to frame a street scheme for such area as they think fit."

Section 41 provides that "every improvement scheme shall provide for (a) the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be required for the execution of the scheme."

Section 42 enacts that "any improvement scheme may provide for (a) the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be affected by the execution of the scheme."

Now it is quite clear that section 42 (a) authorizes the acquisition of land lying within the improvement area but which is not required for the execution of the scheme. The question is to what extent and that must largely depend on what is the meaning of the word "affected."

Mookerjee and Cuming, JJ. held that "affected" means in the section "acted upon physically or materially," and that the power of acquisition given by section 42 (a) applied only where "in respect of those lands there will be a physical interference with a right, public or private, which the owner is entitled to exercise in connection therewith."

This definition is clearly taken from the judgments delivered in the House of Lords in the case of the *Metropolitan Board of Works v. Mc. Carthy* (1). That decision, however, was on the meaning of the word "injuriously affected" as used in section 68 of the Lands

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Clauses Consolidation Act, 1845, which is a very special section. A different meaning has been placed on the same words "injuriously affected" occurring in section 63 of the Lands Clauses Consolidation Act 1845. It has also been held on more than one occasion that the decision on section 68 of the Lands Clauses Consolidation Act, 1845 are of little or no assistance in construing the words "injuriously affected" in sections of Acts of Parliament not in *pari materia* with section 68 of the Lands Clauses Act.

The decision of Mookerjee and Cuming JJ. comes to this that in section 42 (a) of Act V of 1911 (B.C.) "affected" means "injuriously affected." With this result I am unable to agree. I agree with the opinion of Woodroffe, J in his opinion in making this reference that "affected" in section 42 (a) means affected in any way.

Next it was argued that as section 42 (a) only authorizes the Board to acquire land which is affected "by the execution of the scheme" that the Board has only power to acquire land affected during the execution and not by the completion of the scheme. The argument is based on the decision in the case of *Hammersmith Railway Co. v. Brand* (1) which turned on the meaning by the words "execution of the works" used in section 68 of the Lands Clauses Act, 1845. That case, however, is of no assistance in construing section 42 (a) of Act V of 1911 (B.C.). The words "by the execution of the scheme" used in section 42 (a) simply mean through or owing to the execution of the scheme.

Then if that be so, for what purpose can the Board acquire land which is not required for the execution of the scheme under the provision of section 42 (a). The purpose is given in section 81 which authorises the Board to retain or to let on hire, lease, sell or exchange any land vested in or acquired by them under the Act. That the Board have power to acquire land under section 42 (a) for the purpose of "recoupment" is strongly supported by the terms of section 78 of the Act. The view that Mookerjee and Cuming JJ. took of that section was that it applied to land which was originally required for the execution of the scheme but was subsequently found to be unnecessary cannot be supported. In such a case why should the owner pay money to the Board to get back his land.

The meaning of the section is perfectly clear. Under the scheme of the Act primarily the method provided for the Board securing for the public a portion of the "unearned increment" is by the means of recoupment. The legislature did not however absolutely shut out the principle of "betterment" but provided by section 78

(1) (1868-9) L. R. 4 H. L. 171 (174).

that where land is about to be taken for "recoupment" then on the application of the owner he and the Board may, if they agree as to the amount, deal with such owner's land on the principle of "betterment" instead. Section 78, I think, says that in as clear terms as is possible.

Lastly Mookerjee and Cuming JJ. were of opinion that even if the Board had power to acquire land for the purposes of "recoupment" they had no power to acquire such lands compulsorily. The fact that the Board have power to acquire land for the purpose of "recoupment" does not necessarily mean that they have power to acquire it otherwise than by agreement. The powers of compulsory acquisition are set out in section 69 of the Act which provides that the Board may with the previous sanction of the Local Government acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of the Act.

Under the provisions of section 49(1) of the Act the Board are bound forthwith to execute a scheme sanctioned and notified by the Local Government. Surely one of the main purposes of the Act is the expansion and improvement of Calcutta by the execution of improvement schemes framed by the Board and sanctioned by the Local Government. With regard to land comprised in such schemes the acquisition of which by the Board the scheme provides for, the Board with the sanction of the Local Government can exercise their compulsory powers of acquisition under section 69 of the Act. In my opinion we ought to answer the question referred to us in the manner following, namely,—That the case of the *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), in so far as it holds that Act V of 1911 (B.C.) does not authorize the Board of Trustees to acquire land compulsorily for purpose of recoupment *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78 was not rightly decided.

N. R. Chatterjea, J.:—The question referred to the Full Bench is "whether the case of the *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), in so far as it holds that the Act V. of 1911 (B.C.) does not authorize the Board of Trustees to acquire land compulsorily for purposes of recoupment by selling or otherwise dealing with the land under section 81, or by abandoning the land in consideration of the payment of a sum under section 78 was rightly decided."

(2) (1916) I. L. R. 44 Calc. 219 ; 24 C. L. J. 246.

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It is contended on behalf of the appellant that upon the statement of the case in the referring order, this reference does not arise.

The contention of the Trustees (as it appears from the statement of the case) is that they are entitled to acquire the land compulsorily under their improvement scheme as land "which will, in their opinion, be affected by the execution of the scheme" within the meaning of section 42, and the learned Judges who made this reference are also of opinion that it is so "affected."

Woodroffe J. observes "There is no question but that the land in suit was affected so as to justify its acquisition by the Board, whether we limit the term as the appellant suggests, or give it its full meaning as I think should be done. As, however, I am in disagreement with the decision in *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), in that it holds that Act V of 1911 B.C. does not allow the compulsory acquisition of land for recoupment, I agree that the question whether it is good law or not should be referred to a Full Bench in terms of the Chief Justice's judgment."

Chitty, J. observes that "There is no doubt on the facts which are not in dispute" that the land in question is "affected" by the execution of the scheme, "as two small portions have been cut off for rounding of the corners of Halliday Street and streets running into it. To this extent the case is distinguishable from *Chandra Kanta Ghose's case* (1). The question of law, however, in both cases is the same, and as we are in disagreement with the decision in that case I agree that the question should be referred to a Full Bench."

In *Chandra Kanta Ghose's case* (1) the learned Judges were of opinion that the word "affected" in section 42 means "physically or materially affected," and the land proposed to be acquired in that case not having been physically affected was held not to have been "affected" within the meaning of the section 42 (a). They had therefore to consider whether the Board has power to acquire land for the purposes of recoupment by including it in a scheme under section 42 (a), or under the other provisions of the Act. In the present case the learned Judges are of opinion that the land is "affected" within the meaning of section 42 (a) of the Act even according to the interpretation placed upon the section in *Chandra Kanta Ghose's case* (1). It is true the Board in the present case also stated that the land was included in the scheme for the purpose of recoupment, but they also stated that in their opinion the land was affected by the execution of the scheme. If the land is properly

(1) (1916) I. L. R. 44 Calc. 219 ; 24 C. L. J. 246.

included in a scheme under section 42 (a) as land "affected" by the execution of the scheme, it can be compulsorily acquired under section 69 of the Act, and it is immaterial what object the Board have in acquiring the land. No doubt in *Chandra Kanta's case* (1) the learned Judges were of opinion that section 42 (a) does not authorize compulsory acquisition of land but in their view the land in that case was not "affected." The question whether land can be compulsorily acquired in a case where the land is properly included in a scheme under section 42 (a) did not therefore arise in that case. In the present case the learned Judges being of opinion that the land is "affected" even according to the view taken of the word in that case, I think the question whether the Act authorizes the Board to acquire land compulsorily for *purposes of recoupment* does not arise in the present case.

There is no doubt that in many cases Full Benches have declined to answer the questions referred to them on the ground that the reference does not arise. A number of earlier cases on the point are referred to in the case of *Prosunno Coomar Paul Chowdhry v. Koylash Chunder Paul Chowdhry* (1), which was referred to the Full Bench by Peacock C. J. and Loch J. Three of the learned Judges (Peacock C. J., Glover and Jackson JJ.) were of opinion that the questions did arise. The other two Judges (Macpherson and Kemp JJ.) "following the practice acted upon frequently by Full Bench Courts" hold that no answer should be given to the first question referred, on the ground that it did not arise, Jackson J. (although he was of opinion that the question did arise) entirely agreed with Macpherson J. that the Full Bench if looking into the case as far as is necessary for the purpose it should find that the point does not arise ought to desist from answering it, and pointed out the serious inconvenience arising from following the opposite course. Peacock C. J. and Glover J. were of a different opinion; and the former even went so far as to hold that "if uniformity of decision in the High Courts is desirable as it undoubtedly is, one Division Bench ought not to decide contrary to a dictum of another Division Bench without referring the question to a Full Bench." The opinion of Peacock C. J., however, has not been followed by Full Benches, and Full Benches have in many cases declined to answer the question referred where in their opinion it did not arise. For instance, see *Julmati Bewa v. Sheikh Nayan* (2); *Balaram v.*

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(1) (1867) 8 W. R. 428; B. L. R. Sup. 759.

(2) (1894) 4 C. W. N. 803; I. L. R. 28 Calc. 127. (Foot-note).

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Maṅga Dass (1); *Profulla v. Nosibannessa* (2). It is said that the rule does not apply to regular appeals as the case may go to a Division Bench other than the Bench which referred it; and specially where as in the present case the Division Bench have not come to a decision on questions of fact, but may apply to second appeals where the whole case is referred to the Full Bench for decision. But the reference in *Prosunno Coomar Paul's case* (3), arose out of a regular appeal, and in the present case, upon the statement of the case in the referring order itself *Chandra Kanta's case* (4) is distinguishable. I am accordingly of opinion that the question of the correctness of that case does not arise. As however, the majority of the Full Bench are of a different opinion, I proceed to state my views upon the question referred to us.

The first paragraph of the preamble to the Act (Act V of 1911) states the objects of the Act. It says—whereas it is expedient to make provision for

(1) the improvement and expansion of Calcutta by opening up congested areas, laying out or altering streets, providing open spaces for purposes of ventilation or recreation, demolishing or constructing buildings, acquiring land for the said purposes and (2) for rehousing of persons of the poorer and working classes displaced by the execution of the improvement schemes.

It is contended on behalf of the Trustees that in order to read it in this way there should be a comma after the word "purposes." But as pointed out by the Judicial Committee in the case of *Maharani of Burdwan v. Krishna Kamini Dasi* (5), "it is an error to rely on punctuation in construing Acts of the Legislature." The omission of a comma, I think, does not affect the reading of the preamble in the way stated above. Then follow the words "and otherwise as hereinafter appearing." It is contended on behalf of the appellant that the words should be read with the words 'to make provision,' on the other hand it is said that these words mean "by other means and methods as hereinafter appearing." It is difficult to construe the words with reference to the earlier portion of the preamble, but whatever they may mean they have no reference to the acquisition of land, because acquisition of land has already been provided for in the earlier part and is restricted to the "said

(1) (1907) I. L. R. 34 Calc 941; 6 C. L. J. 237.

(2) (1916) 24 C. L. J. 331.

(3) (1867) 8 W. R. 428; B. L. R. Sup. 759.

(4) (1916) I. L. R. 44 Calc. 219; 24 C. L. J. 246.

(5) (1886) I. L. R. 14 Calc. 365 (372); L. R. 14 I. A. 30.

purpose" *i.e.* the purposes expressly mentioned therein. It is to be observed that the acquisition of land for the purposes of recoupment is not one of the purposes of the Act enumerated in the preamble. The second paragraph states that it is expedient that a Board of Trustees should be constituted and vested with special powers for carrying out the objects of the Act. The fourth paragraph recites that the sanction of the Governor-General had been obtained to the enactment of the provisions of chapter V relating to taxation.

Before dealing with the important sections which have any bearing upon the question referred I will briefly refer to the provisions of the Act.

Section 2 gives the definitions of words used in the Act, and it is only necessary to notice clause (f) which says that "Improvement scheme" means a general improvement scheme or a street scheme or both. Chapter II relates to the constitution of the Board, conduct of business, and the appointment of their officers and servants and such other matters. Chapter III deals with improvement schemes and rehousing schemes, and comprises sections 36 to 67. Section 36 provides for the framing of a general improvement scheme and section 39 provides for the framing of a street scheme. Section 40 mentions the matters to be considered when framing improvement schemes in respect of any area, and which include "the nature and the conditions of neighbouring areas and of Calcutta as a whole." Sections 41 and 42 lay down matters which *must* and *may* be provided for respectively in improvement schemes. Section 43 provides for the preparation by the Board of a notice of the scheme and of the boundaries of the area comprised therein and for the publication of such notice, and section 45 provides for the service of notices on persons whose land is proposed to be acquired in execution of the scheme. Section 47 provides for the application by the Board to the Local Government for the sanction of the scheme, and for the particulars to accompany the application. Section 48 provides for the sanction of the scheme by the Government; and section 49 (1) provides for the notification by the Local Government of the sanction and sub-section (2) lays down that the publication of a notification shall be conclusive evidence that the scheme has been duly framed and sanctioned. Section 50 provides for alteration of scheme after it has been sanctioned.

Chapter IV which consists of sections 68 to 81, deals with acquisition and disposal of land. Section 68 provides for the acquisition by the Board of land by agreement and section 69 provides for acquisition of land by the Board for carrying out any of the purposes

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of the Act. Section 70 and the following section provide for the constitution of a tribunal for the purpose of acquiring land. Section 78 provides for the abandonment of land the acquisition of which has been sanctioned but which, is not required for the execution of the scheme.

Chapter V relates to taxation which comprises duty on transfers of property, terminal tax on passengers and customs duty on jute.

Chapter VI deals with finance. Section 88 provides for Municipal contributions, and section 89 gives power to the Board to borrow money. Sections 122 and 123 respectively deal with the crediting of moneys to capital account and with the application of moneys credited to the capital account

The most important sections to be considered in connection with the question referred to us are sections 41, 42, 68, 69, 78, 80 and 81.

Section 41 (a) says that every improvement scheme *shall* provide for the acquisition by the Board of any land which will in their opinion be required for the scheme, whereas section 42 (a) lays down that any improvement scheme *may* provide for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be "affected by the execution of the scheme."

There is no question that the land "required for the scheme" means the land which is actually required for what may be called the engineering or construction works, for instance, in a street scheme the land necessary for laying out the street. The main controversy has centered round the expression "affected" in section 42 (a). In *Chandra Kanta Ghose's case* (1), it was held that the word 'affected' in section 42 means "neither beneficially affected or improved in value, nor prejudicially affected or impaired in value, but signifies acted upon physically or materially" On the other hand in the opinion of the referring Judges it means affected in any way and not merely "physically affected," "affected in value prejudicially or beneficially or so forth." The Dictionary meaning of the word is "acted upon" and it is capable of a very large meaning. It may be conceded that it may mean affected beneficially as well as prejudicially although it is generally used in the latter sense. But the meaning to be attached to the word would vary according to the context, and the question is in what sense the word has been used in section 42 (a), and whether it has any reference to *value* of the land. According to the contention of the respondents the object of inclusion of land under section 42 (a) is recoupment. But the

(1) (1916) I. L. R. 44 Calc. 219 ; 24 C. L. J. 246.

acquisition of land prejudicially affected cannot be any means of recoupment. The word therefore could not have been used in the sense of "depreciated in value." It is true that the Board is not bound to include any land in the scheme under section 42 (a), it is merely optional with them to do so, and therefore they would not include any land depreciated in value within the scheme. But what I mean to say is that the object being recoupment, the word "affected" could not have been used in the sense of 'prejudicially affected in value.' Then does the word refer to land beneficially affected or improved in value? When an improvement scheme is framed with respect to any area the whole of it would be beneficially affected in value by the scheme. For instance in a street scheme, the properties fronting a street would be more beneficially affected in value, the other portions of the area may be less beneficially affected in value by it, but every portion of it will be more or less beneficially affected in value. If therefore the word 'affected' in section 42 (a) has reference to value, the whole of the area may be acquired by the Board under section 42 (a). But if that was the intention of the legislature I do not see the necessity of the words "which will in their opinion be affected by the execution of the scheme," because every portion of the area is affected more or less. In that case after providing in section 41 (a) that the improvement scheme *shall* provide for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion "be required for the scheme," it would have been sufficient to say in section 42(a) that any improvement scheme "*may* provide for the acquisition by the Board of any land in the area comprised in the scheme" and the words "which will in their opinion be affected by the scheme" would be wholly unnecessary. Then again, if the word "affected" has any reference to value and if recoupment is the object of inclusion of land not actually required for the scheme, (the inclusion of lands prejudicially affected in value being out of the question) it is difficult to see why the ambiguous word 'affected' was used instead of "increased in value" which would have expressed the intention which, according to the respondent, the legislature had in framing the section. It is not as if such an expression is never used in similar statutes. Section 58, sub-section 3 of the House and Town Planning etc. Act 1909 (9 Edw. 7 Chap. 44) provides "where by the making of any town planning scheme any property *is increased in value*, the responsible authority...shall be entitled to recover from any person whose property is so *increased in value* one half of the amount of that increase."

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In this connection it may be pointed out that under section 24 of the Land Acquisition Act the Court in determining the amount of compensation to be awarded for land acquired under that Act, shall not take into its consideration, "any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put." That gives the benefit of any rise in the value of other lands of the person whose land is taken up, to him, and section 24 has not been repealed by the Calcutta Improvement Act.

I am accordingly of opinion that the word 'affected' has no reference to value in section 42(a). The only sense therefore in which the word could have been used is in the sense of "acted upon physically or materially." That is one of the recognized meanings as given in the Oxford Dictionary, and in the case of *Metropolitan Board of Works v. Mc. Carthy* (1), the House of Lords in construing the words "injuriously affected" held that "where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference, the property as a property is lessened in value." It is true, that the question in that case was as to the meaning of the words "injuriously affected" in section 68 of the Land Clauses Consolidation Act, 1845, under which the plaintiff claimed compensation, and not merely "affected" as in the present case. But if the word "affected" does not signify physical interference the mere addition of the word "injuriously" would not do so, because when land is depreciated in value, it may also be said to be "injuriously affected." The words, no doubt, had to be construed with reference to the provisions of that particular statute, and it was held that in order to found a claim to compensation under that section for an interest in land "injuriously affected," there must be an injury affecting the house or land itself in which the person claiming compensation has an interest, and that a mere personal inconvenience, obstruction and damage to a man's trade or the good will of his business will not be sufficient. It was further held that the property must be lessened in value by the physical interference, but that was because they had to deal with the question of compensation claimable under the section in respect of land *injuriously* affected.

The passage quoted above, however, shows that the word "affected" may appropriately be used with reference to physical interference with rights. In fact, it is not disputed on behalf of the respondent that it may mean "physically affected," their contention being that it means "affected" in any way whether "physically affected" or 'affected in value.' I think, however, that although the value may also be affected by physical interference, the word as stated above has no reference to value in section 42(a). That being so, the word must in section 42(a) mean "physically or materially affected." It is true that those words are not in the section, but the word 'affected' must be construed having regard to the context.

Land may be physically "affected" by the execution of a scheme in a variety of ways, for instance a building near the improvement may suffer from the construction of work by subsidence, or by having easements affected or by reason of "severance" in which case the Board may have to pay heavy compensation, and it may be more advantageous to the Board to acquire the building or land affected, and then to dispose of it, rather than pay compensation for the injurious affection, although such building or land is not required for the execution of the scheme under section 41(a). Section 49 of the Land Acquisition Act provides that a part only of any house or building cannot be acquired, if the owner desires that the whole of it should be acquired. Now if only a part of a house or building is necessary for the execution of a scheme, the remaining portion of it may be affected by the execution of the scheme. The latter portion cannot come under section 41(a), and must therefore come under section 42(a); and if there were no provisions such as are contained in section 42(a), the whole elaborate procedure prescribed in chapter III of the Act would have to be repeated for acquisition of such land because although no fresh declaration is necessary a fresh sanction of the Government would be required. The word "affected" may properly apply to all such cases as are stated above, and I do not see how it can be said that "physically or materially affected" is not a natural meaning of the word.

It is contended on behalf of the appellant that even if 'affected' means "beneficially affected *in value*," the expression used in section 42(a) being not merely "affected" but "affected *by the execution of the scheme*," the affection must be due to the actual execution of the scheme itself, and not due to any use to which the land is put after the execution of the scheme. In section 41(a) the words land

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"required for the scheme" admittedly means land required for the work actually to be done on it, *i.e.*, the land required for engineering or construction works. The land affected by the execution of the schemes in section 42(a) must therefore mean land affected by the engineering or construction work itself, and I think it must be shown that in any particular case the rise in value is due to the execution of the scheme itself, and apart from the use to which it might be put.

I think it unnecessary, however, to consider the point further, or to discuss the cases decided under the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Acts which were cited before us, because I am of opinion that the word "affected" has no reference to value in section 42(a).

Section 42(a) does not by itself give the Board power to acquire land. The power of acquisition is given by sections 68 and 69. Section 68 provides that the Board may enter into an agreement with any person for the purchase or leasing by the Board from such person of any land which the Board are authorized to acquire or any interest in such land ; and section 69 provides that "the Board may with the previous sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the *purposes of this Act*." No practical difficulty arises in a case of purchase by agreement under section 68, because although in such a case also, the acquisition must be one which the Board are authorized to make, the transaction being by consent of parties, there is no one to raise the question. But where the land is to be compulsorily acquired, it must be shown that it is to be acquired for "any of the purposes of the Act." It is true that the scheme submitted to Government for sanction would include both lands under sections 41(a) and 42(a), but the mere fact that the land is included in the scheme framed under section 42(a) will not justify its acquisition unless it be for the purposes of the Act, otherwise it would have been sufficient to say in section 69 that the Board may acquire any land sanctioned by the Government without the addition of the words "for carrying out any of the purposes of the Act." So that section 42(a) alone does not help us in deciding the question whether land can be acquired for recoupment. The purposes of the Act are mentioned in the preamble. Recoupment is not stated to be one of the purposes of the Act. It is said that recoupment being only one of the means by which the purposes are to be accomplished, does not find a place in the preamble. That

may be so, but when the preamble states "acquiring land for the said purposes" and the purposes such as "opening up congested areas" etc., are expressly mentioned in the preamble, the power given to the Board under section 69 to acquire land for "any of the purposes of the Act" must be taken to have reference to the "purposes" enumerated in the preamble and those only.

It is also contended on behalf of the respondent that "purposes" include the means by which the object is to be attained, and recoupment being one of the means, is one of the purposes of the Act. But I am unable to hold that 'means' which are the instruments for accomplishing the purposes of the Act are 'purposes' of the Act. If, however, the body of the Act gives power to acquire land for the purposes of recoupment *expressly* or by *necessary implication* then the mere fact that the preamble does not state it would not matter. There is no express provision in the Act that any land can be acquired for the purposes of recoupment. Then is the power given by necessary implication? It is said that the words "for carrying out" any of the purposes of the Act in section 69 imply such power, but I think that "carrying out" merely means "giving effect to." The Board has the power to acquire lands for giving effect to the purposes of the Act mentioned in the preamble such as "opening congested areas" and the other purposes enumerated therein, as no other purpose is mentioned in any other part of the Act. Section 80 shows that if any land in respect of which an agreement has been executed or payment has been accepted under section 78, is subsequently required for any of the purposes of the Act, it may be acquired under a fresh declaration. Now if recoupment is one of the purposes of the Act, the same land which has already paid what may be called the exemption fee, may again be included in a scheme for the purposes of recoupment and the process may be repeated any number of times—a result which I think could never have been contemplated.

In *Chandra Kanta Ghose's case* (1), the learned Judges held that section 42 does not authorize compulsory acquisition of land "though it may possibly authorize the Board to acquire land by private agreement." As stated above section 42 (a) by itself does not confer the power of acquisition of any land either compulsorily or by agreement. The question whether any land included in the scheme under section 42 (a), can be compulsorily acquired under section 69, depends upon whether the acquisition of the land is for "carrying out any of the purposes of the Act." Section 42 (a) may be satisfied merely

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by voluntary acquisition. But if any land is "physically" or "materially affected" by the execution of a scheme, the acquisition of such land would be necessary for carrying out the "purposes of the Act." In such a case the Board have the power to compulsorily acquire such land under section 69, as well to acquire it by agreement under section 68, and I do not see any reason why in such a case, land mentioned in section 42 (a) cannot be compulsorily acquired.

Section 49 provides that whenever the Local Government sanctions an improvement scheme it shall announce the fact by notification, and the Board shall forthwith proceed to execute the same, and that the publication of the notification shall be conclusive evidence that the scheme has been duly framed and sanctioned. It is contended on behalf of the respondents that a scheme submitted for sanction under section 47 includes lands proposed to be acquired, under section 42 (a), and when it is sanctioned under section 48, it becomes a statutory duty of the Board to execute it. But that assumes that the scheme has been sanctioned, for the purposes of the Act and that the Act contemplates acquisition of land for the purposes of recoupment. If acquisition of land for the purpose of selling it and making profit therefrom, is a purpose of the Act, the carrying out of a scheme sanctioned by the Government would no doubt be carrying out a purpose of the Act, but that is begging the very question to be decided. The second clause of section 49 says that the publication of the notification shall be conclusive evidence that the scheme has been framed and sanctioned. But the mere fact that it is sanctioned does not show that the land is required for carrying out any of the purposes of the Act.

The next important section is section 78. That section relates to the abandonment of land, the acquisition of which has been sanctioned but which is not required for the execution of the scheme, and great reliance is placed upon it as showing that the Board have the power of recoupment. That section provides that "in any case in which the Local Government has sanctioned the acquisition of land, in any area comprised in an improvement scheme which is not required for the execution of the scheme, the owner of the land or any person having an interest therein, may make an application to the Board, requesting that the acquisition of the land should be abandoned in consideration of the payment by him of a sum to be fixed by the Board in that behalf"

It is contended on behalf of the appellant that it contemplates land which was originally considered necessary for the execution of the scheme, but which is subsequently found not to be so required.

On the other hand, the respondents contend that it refers to land which was not and was never required for the scheme, but which was included in the scheme for the purposes of recoupment. The words used in the section however, are "which is not required for the execution of the scheme," and that implies that the lands were originally considered necessary for the execution of the scheme, but were subsequently found not to be so required. The words, I think, do not refer to the time when the sanction of Government is applied for, but to the time when the abandonment is applied for by the owner under section 78. A comparison of the words used in section 41 (a) and 42 (a) with those used in section 78 indicates this. When framing a scheme under section 41 (a) or 42 (a) it is a mere opinion of the Board that the land "will be required" or will be affected. It is only in the further stages of the proceedings that it may turn out that the land *is not* required, and it is then that the application under section 78 is made. The section may apply to a case where a scheme having been sanctioned was subsequently altered under section 50. It may also apply to a case where a certain quantity of land was entered in the scheme as being necessary for the execution of the scheme, but it was subsequently found that a lesser quantity would suffice for the purpose. It is contended that it cannot apply to surplus lands, because surplus lands can be ascertained only after acquisition. But a scheme may be altered after sanction, and before acquisition and there may be cases where surplus lands are ascertained after sanction and before acquisition. The strongest argument against the applicant's contention is that if it is well-founded the owner has to pay for retaining his own land "which on a mere correct estimate of what was required should never have been taken from him." It is to be borne in mind, however, that the Board cannot of their own motion abandon the acquisition of any land. It is only upon the application of the owner that the Board can do so. If no application is made for abandonment under section 78, the Board must acquire the land (except as provided in section 48 of the Land Acquisition Act), and section 81 provides that the Board may retain or may let on hire, lease, sell, exchange or otherwise dispose of any land vested in or acquired by them under this Act.

The Board are to admit the application under section 78 if it reaches them before the time fixed by the Collector under section 9 of the Land Acquisition Act for making claims in reference to the land. It would appear from sub-section 3 of section 78 that the section has application after the Collector has started proceedings

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under the Land Acquisition Act. It says that if the Board decide to admit any such application they shall forthwith inform the Collector, and the Collector shall thereupon stay for a period of 3 months all *further proceedings* for the acquisition of the land. It appears therefore that the proceedings under section 78 take place after the declaration and before the notice under section 9 of the Land Acquisition Act. But as soon as the declaration is made under section 6 of that Act the power to acquire the land is absolute whether the land is required or not. The Government can withdraw from the acquisition, but it cannot do so except on payment of compensation under section 48 of the Land Acquisition Act, and section 48 (a) of the Improvement Act provides for payment of compensation for delay if the Collector does not make an award within 2 years of the declaration under section 6 of the Land Acquisition Act. The Board therefore incur a liability, as soon as a declaration is made under section 6 of the Land Acquisition Act.

On the other hand as soon as a declaration is made, the owner has no longer any right to get back the land and cannot compel the Government to give it up. The land having been made the subject of declaration, the value of it may go up, in some cases may go up enormously. It is not reasonable that the Board should incur a liability to the owner for damages, and at the same time be deprived of the benefit of the rise in value of the land, and in these circumstances it is not inequitable that the owner should pay for the retention of the land. He is under no compulsion to apply to the Board for abandoning the acquisition, but if he chooses to do so, he must pay the sum fixed by the Board for the abandonment of the land which, if he had not applied for its retention, the Board might have acquired and sold to others at a profit. This however, does not show that lands may be deliberately included in the scheme for the express purposes of recoupment as contended on behalf of the respondent. The lands are not to be included in the scheme originally for the purpose of thereafter making profit, but if they are included because considered necessary for the scheme, and it is subsequently found not to be required either by reason of an alteration of the scheme, or by reason of less lands being actually required, the Board have the power to dispose of such lands. The provisions of section 81 apply to such lands. That section gives to the Board the power to dispose of lands vested in or *acquired* by them under the Act and that of course means properly acquired by them. It is contended that cases of alteration of scheme or mistake in estimate must be rare, and that it is not likely that the elaborate

provisions of section 78 should have been framed for such stray cases, and that under the circumstances the construction contended for on behalf of the respondent should be preferred. But the Act contemplates alteration of schemes and section 50 makes express provisions for it, and there may be some cases of wrong estimates.

Once it is held that such cases may come under the section, it cannot be said that the section gives the power of acquisition of lands for the purposes of recoupment by necessary implication. It appears that Greaves J. by whom this case was originally tried did not attach much importance to the argument founded upon section 78, and he was of opinion that the words of the section would be satisfied by applying them to 'surplus lands', and that he should be loathe to spell out of these words so large a power as is claimed by the defendant. I agree with what Greaves J. says on this point. The question is not whether the power of acquisition of land for the purposes of recoupment can possibly be spelt out of the section, but whether the power is given by *necessary* implication. If the construction put forward on behalf of the appellant can reasonably be placed on the section, in other words if the words of the section can be satisfied by reference to lands subsequently found unnecessary, it cannot be said that the power of recoupment is given by *necessary implication*. As pointed out by Bell J. in *Dickson v. Pape* (1) "a necessary implication is not guess, not probability but an inference which by no reasonable intendment can be otherwise, it is a state of things excluding any reasonable conclusion but the one." The powers claimed by the Trustees are very large; according to that contention they may acquire any land within area for which an improvement scheme is framed, for the purpose of recoupment. Now, when there are two possible constructions of the words defining their powers, if on the one construction the Board would have almost unlimited power of interference with private rights, and in the other they are not clothed with such power, but with a power more convenient and limited, the latter construction should be preferred.

It is not and cannot be disputed that the power of recoupment may be given to municipal and other public bodies. As stated in Halsbury's Laws of England Vol. VI, page 25 "Municipal and other public bodies are sometimes given powers to take land beyond that which is necessary for the actual execution of the proposed works in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the

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(1) (1845) 7 Ir. L. R. 107 (123).

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rate-payers. These lands are said to be authorised to be taken for the purpose of "recoupment" as the public body is empowered to sell or lease them out at what may be an enhanced value. *Galloway v. London Corporation* (1), *Quinton v. Bristol Corporation* (2). If the Act clearly authorises the land to be taken for the actual works only, a local authority or other public body will be restrained from taking more than is actually necessary for such works: *Donaldson v. South Shields Corporation* (3), but if it appears that it is the intention of the Act that the public body are to be allowed to reimburse themselves, they will then be at liberty to take all the lands delineated on the plans: *Galloway v. London Corporation* (1), *Quinton v. Bristol Corporation* (2). On the other hand when local authorities are authorized to take lands from time to time for specific works such as street widening and the land is not specified in the Act, they cannot, in order by resale to reduce the expenses to the rate-payers take more than is *bona-fide* necessary for the purpose: *J. L. Denman & Co. Ltd. v. Westminster Corporation* (4), *Fernley v. Lime-house Board of Works* (5). It will serve no useful purpose to discuss these cases which turn upon the provisions of the particular statutes with which they deal. I will only notice two cases upon which the parties respectively placed some reliance. On behalf of the respondent reliance was placed on the case of *Galloway v. The Mayor and Commonalty of London*, (1) where it was pointed out that there is a distinction between power given to a body of adventurers for a certain purpose (as for example the formation of a railway) and powers given to an existing public body such as the corporation of a city of making public improvements in its city, and that the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction. But even such public bodies authorized to make large improvements cannot exercise their powers except for the purposes of the Act. It is to be borne in mind that in England statutes authorizing public bodies to acquire land compulsorily generally contain a schedule or a plan or a book of reference defining the land to be acquired. In the case of *Gard v. The Commissioners of Sewers of the City of London*, (6) Kay J. in construing the statute 57 Geo. III C. XXIX. which empowered a public body to alter and widen the streets, and for that purpose to compulsorily acquire lands and houses which might be adjudged by them to prevent or obstruct such widening

(1) (1866) L. R. 1 H. L. 34

(2) (1874) L. R. 17 Eq. 524.

(3) (1899) 68 L. J. Ch. 102.

(4) (1906) 1 Ch. 464.

(5) (1899) 68 L. J. Ch. 344.

(6) (1885) L. R. 28 Ch. D. 486.

or alteration, after stating that the Commissioners (in that case) were a body like the Corporation of London in the case of *Galloway v. The Corporation of London* (1) "armed with powers for the purpose of making improvements in this great city; and that it is part of the scheme of the Act that they may take, in carrying it out at some time, more land than is actually wanted for the physical purpose of widening the streets, and therefore the Court will deal very liberally with them, will give a most wide interpretation to, and will not interfere with their powers although it may appear that they are taking more lands than will be wanted for the actual widening, and intending, all along, to sell the portion which they will not use for that purpose, and by the sale to raise money to enable them to carry out the purposes of the Act observed as follows—"I was referred to the 96th section of the Act, to show that they have the power, subject to the right of pre-emption, of selling any land which they may have taken and which they really do not want for the purpose of widening the streets, and that the moneys which they obtained from such a sale may be used for the purposes of the Act, and it was urged that this is within the case of *Galloway v. Corporation of London*, (1). Now there is a very wide distinction between this and the case of *Galloway v. Corporation of London*; (1). In that case the lands which were to be taken were all put in a schedule to the Act; they were actually defined by boundaries and quantities, and the words of the Act were that they might take all those lands, which not only shewed the extent to which they were to go, but placed a limit within the four corners of the Act, upon the quantity of land which they were to take. There is nothing of that kind in this statute. It contains no schedule. There is no limit whatever upon the lands which are to be taken, save such as is comprised in the words which I have read, and that makes an enormous difference between the two cases. Suppose, for example, that the Commissioners were to desire to widen one of the main thoroughfares of London—the whole of Fleet Street or one of the great arteries of London, or so much as came within their jurisdiction—and to say "We will take lands on both sides of the street," if the argument be right, they could adjudge that every house and every piece of vacant land on both sides of the street obstructed it, however wide these might be, and they might take the whole of every such house and piece of land. Suppose the street passed the Bank of England, they might, if they thought fit, take the whole of the Bank, although they might

(1) (1866) L. R. 1 H. 1. 34.

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only want two feet of it for the purposes of widening the street. Suppose there was a large frontage of land, a quarter of an acre, in the city of London vacant, with no building upon it, then although they might only want a yard of such frontage they might if they chose, take the whole, according to the argument. That would be giving a very much greater power to the Commissioners having the control of pavements than was given in *Galloway v. Corporation of London* (1) and that is a distinction between the two cases which would make me hesitate very much indeed before I could hold that under the Acts such bodies as the Commissioners are entitled to such power as that. In the Court of appeal (which affirmed the decision of Kay J.) Baggallay L. J. referring to *Galloway's case* (1) observed "The circumstances in that case as has been pointed out in *Thomas v. Daw* (2) were very different. In that case the corporation were not merely authorised to take what they might adjudge to be necessary for the purpose of improvement they were about to effect, but lands were specified in the schedule to the Act of Parliament and power to deal with them was given by the Act to the corporation." I have quoted the observations of Kay J. at length, for the purpose of showing that there is a wide distinction between a statute in which the legislature has expressly defined the lands to be acquired, and a case like the present where the lands are not defined in the Act and a public body have been given power to acquire land only for the purposes of the Act. The scheme when framed under section 42(a) of the Calcutta Improvement Act would define the area out of which the acquisition is to be made, but the area is not defined by the statute itself. The Board may frame a scheme of improvement either under section 36 or section 39 for such area as they may think fit, and if the respondents' contention is correct they can include any land within the scheme they think proper, with the deliberate object of recoupment and then acquire any such land for the purposes of recoupment. That is a power wholly different from the power to acquire land for purpose of recoupment within an area defined by the statute itself.

It is said that the principle of recoupment is well known in this country, and reference is made to the Calcutta Municipal Act, and the Bombay City Improvement Act, though the word 'recoupment' is not expressly used in any Act. But whether any statute gives the power or not depends upon the construction of the particular statute, and the intention must be gathered from the language used in the particular statute. With regard to the Acts referred to above,

(1) (1866) L. R. 1. II. L. 34

(2) (1866) L. R. 2 Ch. App. 1.

however, it may be observed, that in the first place it does not appear that the question whether the public body concerned has the power of acquiring land for the purpose of recoupment has ever been raised or decided. In the next place the words used in those Acts are different from those used in the Calcutta Improvement Act.

Section 357 (1) of the Calcutta Municipal Act III of 1899 after providing, for the acquisition of any land "required for the purpose of widening, extending or otherwise improving any public street and the buildings if any standing upon such land" provides in sub-section (2) for the acquisition of any lands *in addition* to those mentioned in sub-section (1) outside the proposed street alignment with the building thereupon, which the corporation may in the exercise of any of the powers conferred by sub-section (1) consider it expedient to acquire. It is to be noted that whereas under section 42 (a) of the Calcutta Improvement Act, in order to enable the Board to acquire any land in the area comprised in the scheme it is necessary that the land must in their opinion be "*affected by the execution of the scheme*," section 357 (2) of the Calcutta Municipal Act empowers the corporation to acquire any land outside the street alignment which it may consider *expedient* to do so, in exercise of the powers conferred by sub-section (1) of that section. Section 25 of the Bombay City Improvement Act (Bombay Act V of 1898) provides that improvement scheme which may exclude any part of the area in respect of which an official representation is made, or include any neighbouring land if the Board are of opinion that such exclusion or inclusion *is expedient*, shall, within the limits of the area comprised in the scheme provide for the acquisition of any land which will in the opinion of the Board be *necessary for or affected by the execution* of the scheme. Section 29 provides that on receipt of the sanction of the Government a declaration is to be notified under the signature of a secretary to Government stating the fact of such sanction, and that the land proposed to be acquired by the Board for the purposes of the scheme is required for a public purpose, and that the declaration *shall be conclusive evidence* that the *land is needed for a public purpose* and the Board shall thereupon proceed to execute the scheme. The publication of a notification under section 49 of the Calcutta Improvement Act, however, is conclusive evidence only of the fact that the scheme has been duly framed and sanctioned. However that may be, as I have said already, one Act cannot be construed with reference to the provisions of another Act. The question whether the Calcutta Improvement Act gives power to the Board of compulsory acquisition of land for the pur-

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poses of recoupment, must be determined with reference to the provisions of that Act.

The Calcutta Municipal Act gives wider powers to the corporation than those given to the Board by the Calcutta Improvement Act. But it may be pointed out that when land is acquired under the Calcutta Municipal Act, the market value of the land or building under section 557(d) of that Act shall, until the contrary is shown, be presumed for the purposes of the clause, *first* of subsection (1) of section 23, to be twenty-five times the annual value of the property as entered in the assessment book prescribed by the Act, and when land is acquired under the Land Acquisition Act the owner is entitled to the 15 per cent. statutory compensation in addition to the market value of the land. Under the Calcutta Improvement Act there is no such presumption, nor is the owner entitled to any statutory compensation.

Chapter V and VI of the Act relates to taxation and finances. In addition to the duty on transfer of property, terminal tax on passengers and customs duty on jute there is provision for municipal contributions and section 89 gives the Board the power to borrow *any sum necessary for the purpose of meeting expenditure* debitable to the capital account under section 123. Section 123 lays down that the money credited to the capital account shall be held by the Board in trust and shall be applied to (among others) meeting all costs of framing and executing improvement schemes and rehousing schemes, and meeting the costs of acquiring land for carrying out any of the purposes of the Act. If the acquisition of land for the purpose of recoupment was intended to be one of the means for carrying out the objects of the Act (and the intention must be determined as *expressed* in the provisions of the Act) the legislature would have expressed it in clear language so as to put it beyond reasonable doubt, as it has done in the case of other means for carrying out the objects of the Act, and would not have left it to be spelt out of section 42(a) or 78 of the Act.

The order of reference to the Full Bench refers also to section 81 of the Act. But that section comes into operation only when land has been acquired by, or vested in, the Board. Where land has been acquired by or vested in the Board properly, or in cases properly coming under section 78, the Board have the power of disposal of such lands, or of requiring the owner to pay for abandonment as the case may be, and disposal of every land vested in the Board may not result in profit. But as already explained that is very different from including land in a scheme (which is

neither required for nor affected by the scheme) with the deliberate object of acquiring it for the purpose of recoupment.

I have the misfortune to differ from the majority of the Full Bench, but after an anxious consideration of the provisions of the Act, I am unable to hold that the case of *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), in so far as it holds that the Act V of 1911 B.C. does not authorise the Board of Trustees to acquire lands compulsorily for the purpose of recoupment was wrongly decided, and I would accordingly answer the question referred, in the affirmative.

Teunon, J.—This reference arises out of the proposed acquisition by the Board of Trustees for the Improvement of Calcutta of a plot of vacant land, being premises known as No 10, Halliday Street.

It appears that the Board of Trustees have decided to make or open out in the northern part of Calcutta a main thoroughfare spoken of as a Central Avenue, and that the making of this avenue involves the widening of the street known as Halliday Street. With this chief object in view, and in pursuance of a resolution in terms of section 39, clause (c), of the Calcutta Improvement Act, 1911, the Trustees have framed their scheme No. VIIA. in the manner contemplated in sections 39 to 42 of the Act. The scheme has been duly published as required by sections 43 to 45 and, on submission, in accordance with the provisions of section 47, has been sanctioned by Government under section 48.

The scheme thus sanctioned comprises a considerable area and provides, *inter alia*, for the acquisition of a part of such area including premises No. 10. The said premises are said to measure 2 bighas 15 cottahs, and though a small portion is required for the widening of the Street, *i. e.*, for rounding off the corners at the junction of Halliday Street with 2 side streets, the major portion avowedly has been included within the area of acquisition under the provisions of section 42(a), as land which, in the opinion of the Board, will be affected by the execution of the scheme. In other words, in the opinion of the Board, by the widening of Halliday Street, this land will be enhanced in value, and in so far as it is not within the street alignment and so required, it is to be taken for purposes of recoupment.

The owner, one Mani Lal Singh, accordingly brought his suit substantially to restrain the Trustees from acquiring the said major portion falling outside the street alignment on the ground that

(1) (1916) I. L. R. 44 Calc. 219 ; 24 C. L. J. 246.

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acquisition for purposes of recoupment is not within their statutory powers. On the 17th day of July 1916, the question thus arising was decided against the plaintiff by Greaves J. sitting in the exercise of the Original Civil Jurisdiction of this Court.

Meanwhile in the case of *The Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), the same question had arisen in respect of premises No. 40/10 Chaulpati Road which lie within the District of the 24-Pargunnahs and outside the limits of the Original Civil Jurisdiction. In that case the question was decided in favour of the plaintiff and against the Trustees by the Subordinate Judge of the 24-Pargunnahs, and, on appeal by the Trustees, on the 22nd of August 1916, his decision was affirmed by the Divisional Bench.

Against the decision of Greaves J. the plaintiff Mani Lal Singh next appealed, and the learned Judges constituting the Bench before which this appeal came, finding themselves in disagreement with the decision of the 22nd August 1916, have consequently referred to the Full Bench, the question which may be stated in effect as follows, namely, "whether the case of the *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghose* (1), in so far as it holds that Bengal Act V of 1911 does not authorise the Board of Trustees to acquire land compulsorily for purposes of recoupment, was rightly decided."

In the case of *Chandra Kanta Ghose* (1), the premises 40/10 Chaulpati Road lay wholly outside and some 55 feet away from the street alignment there proposed. In the case of Mani Lal Singh, as I have already pointed out, a small portion of the area or premises proposed to be acquired falls within, and the major portion without, the proposed street alignment. At the hearing of this reference it was consequently suggested, though, as it appeared to me, in a half-hearted manner, that on the facts the two cases should be distinguished and that the reference to the Full Bench was therefore unnecessary and incompetent. To this contention I am unable to accede. As regards the major portion of the premises in question, the portion falling outside the proposed street alignment, the Divisional Bench making the reference found themselves, as I understand, unable to distinguish between the case before them and the case of *Chandra Kanta Ghose* (1). In my opinion, in so far as that area is concerned, the two cases cannot be distinguished, and the question referred should therefore be answered.

The decision of that question depends, in my opinion, on the construction to be placed on section 42, clause (a), of the Act,

(1) 1916) I. L. R. 44 Calo. 219 ; 24 C. L. J. 246.

which reads thus—"Any improvement scheme may provide for (a) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme."

The argument before us has been somewhat discursive, but the considerations advanced, in support of the plaintiff's contention that section 42, clause (a), should not be construed as authorising acquisition for purposes of recoupment, may be summarised as follows:—In the preamble, and again in chapter V dealing with taxation, there is no reference or no specific reference to recoupment: In other Acts, in which acquisition by local authorities for purposes of recoupment is authorised, for instance in the Calcutta Municipal Act, 1899, section 357, and in the recent Town Planning Act of the Imperial Parliament, we find express reference to "expediency" or to "increase in value": Inasmuch as the Act is one which gives large powers of interference with private rights, its provisions should be strictly construed: In construing the words [section 42 (a)] "affected by the execution of the scheme" we should be guided by the decisions of the Courts in England under the Lands Clauses Consolidation Act in the case of lands "injuriously affected by the execution" of the authorised "works" or "undertaking," and we should further have regard to the analogy afforded by the sixth clause of section 24 of the Land Acquisition Act, I of 1894. Lastly, it is contended that section 78 of the Improvement Act, regarded by the referring Judges as embodying a distinct reference to, and therefore as of special importance in construing section 42 (a), should itself be construed as referring merely to lands which, for some or other cause, for example by reason of some mistake or some alteration in the original scheme, have become "superfluous" or surplus lands: °

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For these reasons, it is contended, we should construe the word "affected" as having no reference to value but as implying some physical interference resulting in either a decrease or an increase in the rights which the owner of the land in question is entitled to exercise in connection therewith. In this view we should, therefore, hold that recoupment is not a purpose for which, under section 69 of the Act, the Board may, with the sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act.

To the argument based on the omissions from the chapter on Taxation and from the preamble, on the use of other language in other enactments, and, on the sixth clause of section 24 of the Land

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Acquisition Act, I am unable to attach importance. A provision for recoupment is not a form of taxation. In the preamble the main object of the Act, namely, "the making of provision for the improvement and expansion of Calcutta" is set out. There is no exhaustive enumeration of the ways or methods in which, far less of the means whereby the end in view is to be attained, and it cannot be said by reference to the preamble alone that power to secure to the Trustees the improved value, or part of the improved value, resulting from their expenditure of public funds, is not one of "the special powers" with which they may be invested. In any case the operative provisions of the Act are not to be controlled or restricted by the preamble.

No doubt when in an enactment authorising public bodies to execute improvements and to acquire the lands necessary for the same we find that they are further authorised to take such additional lands as "they may think it expedient to take", or such lands as in their opinion will be "increased in value" by the improvements made, it becomes clear that in such enactment the legislature has recognised and embodied the principle of recoupment. But no stereotyped form for the conferment of this power of acquisition for purposes of reimbursement has yet been evolved, and the question is whether by the language used in the enactment under consideration that power has been given.

Similarly the analogy afforded by the sixth clause of section 24 of the Land Acquisition Act does not appear to me to assist the appellant. In the Improvement Act the plans, schedules and books of reference required by English statutes, are replaced by a description of the area "comprised in the scheme." Such scheme is framed in the first instance by the Board, after consideration of objections and representations, is submitted with plans and full particulars to Government for approval, and is finally sanctioned, if approved, by Government. The area fixed and sanctioned as "the area comprised in the scheme" may be said to correspond with the "lands delineated on the plans" in England. The Board must provide [section 41 (a)] for the acquisition of all lands falling within that area and "required for the actual execution of the scheme," that is, I take it, for the construction of the proposed improvements. As in England the promoters may, if so empowered by the Act, take all "the lands delineated on the plans," so here the Board [section 42 (a)] may take the whole or any part of the remaining area comprised in the scheme if, in their opinion, such whole or part "will be affected by the execution of the scheme," that is, by the proposed improvements

when executed or completed. No doubt the sixth clause of section 24 of the Land Acquisition Act has not been modified by the provisions of this Act, but the clause embodies merely a principle of valuation, and the "other land" referred to therein must, in cases such as the present, be lands outside the area comprised in the scheme, or land which, though within that area, the Board does not propose to acquire.

It is then said that in Acts authorising the taking of private property doubtful provisions should be construed in favour of the land owner. But the cases of *Galloway v. London Corporation* (1), *Quinton v. Bristol Corporation* (2), and *Rolls v. London School Board* (3), would seem to be authority for holding that to public bodies acting for the public benefit the principle above enunciated is not to be applied so strictly as in the case of companies seeking their private profit. However that may be, the question, to use the language of Chief Justice Erle is, what meaning and intention "is conveyed to the rational mind" by the words used in the present Act.

The argument based on the Lands Clauses Consolidation Act, and on the meaning placed by the Courts in England on the words "injuriously affected by the execution of the work" in the said Act is possibly the one on which, on behalf of the appellants, has been laid most stress.

The argument is two-fold. In the first place it is said that the words "by the execution of the scheme" restrict the Board of Trustees and the Court to the effect produced by the acquisition of the lands required for the actual execution of the work, that is, in this case, for the construction of the widened thoroughfare. We may not, it is said, take into consideration the use to which the land so required is to be put. This branch of the argument appears to be based partly on the analogy afforded by the 5th and 6th clauses of section 24 of the Land Acquisition Act and partly on the English decisions which, in the case of persons from whom no land is taken, limit compensation to damage caused by the construction of the undertaking, and exclude damages arising from the subsequent authorised user. This branch of the argument is, in my opinion, fallacious. We are here dealing with an improvement scheme as a whole, and the prospective user, or the possibility of such user, is of the essence of the matter.

The argument in its second Branch is, that we should give to the word "affected" in section 42, clause (a), the meaning given in the

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(1) (1866) L. R. 1 H. L. 34.

(2) (1874) L. R. 17 Eq. 524.

(3) (1884) 27 Ch. D. 639.

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Lands Clauses Consolidation Act and in the decisions thereunder to the words "injuriously affected."

I am not of opinion that the said Act and the cases cited are of any assistance to us. The Act and the cases, in so far as we are now concerned with them, deal only with damage sustained by reason of "injurious affection," and the title to, and assessment of compensation in respect thereof. A distinction is drawn between cases in which other lands of the claimant have been taken and cases in which no other lands of the same owner have been acquired. The rules or principles laid down as applicable in the two cases are not in all respects the same. No such distinction appears to be drawn in section 42 of the present Act. Moreover, the word used is "affected," not "injuriously affected." The omission of the word "injuriously" cannot be supposed to be otherwise than of intention. Indeed, the words "injuriously affected" were before the framers of this Act in the Land Acquisition Act under which proceedings for compulsory acquisition have to be taken. I am, therefore, unable to assign to the word "affected" now under consideration the meaning or meanings that have been placed upon the words "injuriously affected" in the Lands Clauses Consolidation Act.

Indeed, as has been affirmed by the learned Judges who decided the case of *Chandra Kanta Ghose* (1), the word "affected," as used in section 42, sub-clause (a), of the Improvement Act, is not a 'word of art' to which a technical meaning must be given. It must be construed in its ordinary acceptations, and with reference to the context. When that is recognized, its interpretation in the present case does not to my mind present much difficulty. Land upon which an effect of some sort or kind has been produced, whether for the better or for the worse, would seem to have been "affected." If by the widening of Halliday Street, and the consequent improvement in means of access and in other amenities, these lands will, in the opinion of the Board, be appreciated in value, the Board is in my judgment entitled to say that these lands "will in their opinion be affected by the execution of the scheme."

In this conclusion I am fortified by the provisions contained in section 78 of the Act, and with all respect I am unable to agree with Greaves J. in attaching no importance to that section. The section provides in substance that on application by the owner and on payment by him of a sum 'to be fixed by the Board', that is a sum arrived at apparently by a process of negotiation or 'haggling,' the Board shall abandon the proceedings for the compulsory acqui-

(1) (1916) I. L. R. 44 Calc. 219 ; 24 C. L. J. 246.

sition of any land, not being land required for the execution of the scheme. The appellant contends that this section should be construed as dealing only with land which, for any reason, has become 'superfluous.' Any such construction appears to me to be strained and unnatural. The applications have in fact to be made at a time when in ordinary course it could not be predicated that any land originally 'required' had become superfluous. The words "required for the execution of the scheme" appear clearly to refer to section 41, clause (a), and the lands that may be dealt with under this section are the additional lands which the Board had proposed to acquire as being lands "affected" within the meaning of section 42, clause (a). In other words, if in respect of such lands the Board and the owner can arrive at an agreement as to the measure of the "affection" or appreciation, the Board, instead of completing the acquisition and dealing with the lands thereafter under the provisions of section 81, may realise forthwith the improved value, or a reasonable share in the improved value, resulting or likely to result from their expenditure. It is contended that the provisions of section 80, which render the land, in respect of which such payment has been made, liable to inclusion in subsequent improvement schemes, militate against the construction which I place on section 78. I am unable to agree. In any such subsequent scheme, the value determined by the first scheme becomes the starting point, and there is nothing inequitable in including the land in the second, whether by reason of its being required for, or by reason of its being still further appreciated in value by, such second scheme.

In conclusion, I should say that the equity of the principle which requires contribution from private owners in respect of an increase in the value of their properties resulting from improvements effected out of public funds, has now long been recognised. Such contribution may be obtained by the imposition of a "betterment" or "improvement" charge; or of a "frontage rate," or by the method of recoupment. It would indeed have been matter of surprise if in an Act passed in the year 1911 in order to the carrying out of large measures of town improvement, the legislature had omitted to secure any portion of the improved value "in ease of the burden upon the rate-payers." In this Act we find no indication of frontage rates or improvement charges. We might, therefore, reasonably expect to find recognition of the system of recoupment. That system may in practice result in heart-burning as between A whose land has been included in the acquisition area and his neighbour B whose land has been left out. Doubtless it is this result which has led to

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the charges levelled against the system, and against this Act if construed as sanctioning the system, namely, that it is arbitrary, unjust, authorises confiscation and the levy of blackmail, and leads or may lead to oppression. There may be particular instances of hardship, but as between the private owner and the general body of rate-payers or tax-payers the method, in my opinion, is essentially just. Further, in the Act, against the abuse or misuse of the powers conferred, ample safeguards have been provided. I am not, however, to be understood as saying that these considerations have weighed with me in construing the Act.

In my judgment, in sections 42, 78 and 81 of the Act, clear and plain provision has been made for the taking of additional or excess lands for the purpose of securing to the rate-payers, or their representatives the Board of Trustees, the increase in value or part of the increase in value resulting, or likely to result, from the improvements effected. It follows that the acquisition of such lands is in furtherance of the objects of the Act, and that under section 69 the Board may with the previous sanction of the Local Government acquire such lands under the provisions of the Land Acquisition Act, 1894.

In this view the answer to the question referred to the Full Bench, in my opinion, should be in the negative.

Richardson, J.—The clause on which the answer to this reference mainly depends is contained in an Act of 1911 for the improvement and expansion of Calcutta in various ways involving the acquisition of land either by agreement or, subject to the payment of compensation to the owner, by compulsion. The machinery set up is a Board of Trustees, invested with special powers for carrying out the objects of the Act. The full name of the Board is "The Trustees for the Improvement of Calcutta" (section 3). The short name, which is generally used, is "the Board" [section 2 (c)]. Chapter II relates to the constitution of the Board and cognate matters. The principal function of the Board is to prepare and execute "improvement schemes" and "rehousing schemes," which are dealt with in chapter III. By definition (section 2) the term "improvement scheme" means a general improvement scheme or a street scheme, or both." Chapter IV headed "acquisition and disposal of land" includes four sections with some bearing on the matter in hand. They are sections 68 and 69 and sections 78 and 81. The remaining chapters have little relevancy. Their headings are chapter V, "Taxation," chapter VI "Finance," chapter VII "Rules" and chapter VIII "Supplemental Provisions." There is also a schedule

which, in conjunction with section 71, modifies in some particulars the Land Acquisition Act, 1894. Land is compulsorily acquired under the provisions of the latter Act as modified.

Chapter III which includes the disputed clause [section 42 (a)] is the most important in the Act. It forms the constructive part to which the rest of the Act is subordinate. Sections 36 and 39 indicate the conditions under which the Board are empowered to frame "general improvement schemes" and "street schemes." The next few sections apply to improvement schemes generally. Section 41 indicates what an "improvement scheme" must comprise and section 42 what it may comprise. When such a scheme has been framed, provision is made (a) for its publication in the Government Gazette and in local newspapers "with a statement of the period within which objections will be received" (section 43), (b) for notice to the Chairman of the corporation in case the corporation may think fit to make any representation with regard to the scheme, and (c) for service of notice individually on the owners and occupiers of land "which the Board propose to acquire in executing the scheme." The notice to an owner or occupier shall, *inter alia*, "require such person, if he dissents from such acquisition, to state his reasons in writing within a period of sixty days" [section 45 (b)]. By section 47 the Board is required to consider all objections, representations and statements of dissent received under the preceding sections and to hear all persons making them who may desire to be heard. By the same section, when the prescribed procedure has been followed, the Board may either abandon the scheme or submit it to the Local Government for sanction. If sanction is applied for and granted, then, by section 49, the fact is to be announced by notification and "the Board shall forthwith proceed to execute the scheme." Section 50 makes provision for the alteration of a sanctioned improvement scheme before it has been carried into execution. The rest of the chapter need not be further noticed.

As Mr. Das argued, clause (a) of section 42 must clearly be read with clause (a) of section 41. There are two categories of land, land required for the execution of the scheme, for the acquisition of which provision must be made in the plans, and land affected by the execution of the schemes for the acquisition of which provision may be made. The controversy relates to the words "affected by the execution of the scheme" and the extent or nature of the discretionary power which the clause confers. The words are no doubt wide and general and, because of their generality, may seem subject to possible limitation, should the context require it.

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There is no presumption, however, that general words are not used in a general sense. The presumption is the other way. The general rule for the construction of statutes is that the legislature means what it says. The words best declare the intention : *Sussex Peerage case* (1). But owing perhaps to the imperfection of language as an instrument, or to the fact that language is sometimes misused even in legislative enactments, it may not always be easy to say what the meaning is. The language may be doubtful or ambiguous. The Courts may have a choice between different possible constructions, and in such cases there may be subsidiary rules or principles more or less controlling the choice according to the nature of the subject matter, whether the Act is penal or remedial and so forth. Beyond that there is more delicate ground where the strict literal meaning would lead to a result so absurd as to be irrational, and it may be found possible to modify the meaning so as to avoid that result.

These observations merely echo what has been so often and so forcibly laid down by Judges of the highest authority in England—never perhaps more forcibly than in the case relating to the Trade Disputes Act, 1906 : *Vacher & Sons v. London Society of Compositors* (2). In another case in the same volume : [*Inland Revenue Commissioners v. Herbert* (3)]. Lord Haldane restates the law, with particular application to legislation of a novel kind, in a passage which I venture to quote :

"In approaching the controversy as to the meaning of these sections, I think it worth while to recall a principle which must always be borne in mind in construing Acts of Parliament, and particularly legislation of a novel kind. The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless, to do so would lead to a result which is so absurd, that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated."

(1) (1844) 11 cl. & F. 85.

(2) L. R. (1913) A. C. 107.

(3) L. R. (1913) A. C. 326.

Now if that be the spirit in which a question of this nature, should be approached, it seems desirable to determine the ordinary and natural meaning of the words used in the clause before us before considering whether by any legitimate process of construction those words can or should be made to yield some other meaning.

In the first place the only limitation, imposed by the clause itself, on the locality of the land affected, is that the land must be in the area comprised in an improvement scheme which has been subjected, or laid open, to the fire of criticism which the Act allows and invites.

Then as to the word "affected", "affect" in its primary or dictionary sense is an extensive but colourless word. But it is a word which easily takes colour from the context in which it is used. According to the context, it may mean affect in one way or the other, for the worse, or for the better. It may be that it often has the secondary sense of affecting adversely. An illustration will be found in the third paragraph of the preamble. An Act which affects a previous Act is an Act which alters or is inconsistent with the previous Act.

In the present context, the scheme is an improvement scheme. The full phrase is "land affected by the execution of the improvement scheme." To my mind at any rate that suggests land affected for the better; and in my opinion, though the words may be wide enough to include land prejudicially affected, should the Board choose to acquire such land, they specially include and signify land beneficially affected.

As to the words "by the execution of the scheme," which qualify the word affected, I cannot doubt that they naturally and obviously refer not only to the period of construction but also to the period immediately following when the improvement scheme is completed and in operation "and a going concern": *Harding v. Board of Land & Works* (1). Mr. Mitter suggested that "the execution of the scheme" must mean the same in section 42 (a) as in section 41 (a). But the two expressions "required for the execution of the scheme" and "affected by the execution of the scheme" must each be construed as a whole.

It follows then that, in my opinion, the whole clause is wide enough to embrace a discretionary power, on the part of the Board, in framing an improvement scheme, to make provision for the acquisition of land in the area specified, which will, in their opinion,

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be beneficially affected by the execution of the scheme as an accomplished fact.

If that be so, provision may clearly be made for the acquisition of land for purposes of recoupment. It is said, that introduces a novel power to which the Act makes no express reference. But if the power comes within the ambit of the phraseology, the criticism is at best inconclusive. No one denies the generality of the words and it is the function of general words to include things not specially named. The source of the words appears to be the similar but not in all respects identical Act in force in Bombay, (Bombay Act IV of 1898) though counsel was stopped by the Court from arguing that what may have been done in Bombay under that Act was of any assistance in interpreting the Calcutta Act. The clause in the Calcutta Act fills a prominent place and means something. As it stands, there is no restriction on the purposes which the Board may have in view in exercising their discretion. The purpose of recoupment is not excluded. Undoubtedly the power to acquire land for that purpose is a large power, but that fact by itself is not a sufficient reason for limiting and cutting down general words, still less for putting in words which are not there.

The construction of the disputed clause thus arrived at, while it conflicts with nothing in the preamble or any other part of the Act, seems to me supported and confirmed by the provisions of section 78 and section 81.

The preamble even if it controls the enacting provisions, which it does not, creates no difficulty. Recoupment may not be directly a method of improvement on the same plane with the method specified in the first paragraph, but indirectly it may be a method of great, and possibly indispensable, service. The power to acquire land for that purpose may easily, without straining the language at all, be included among the special powers with which the second paragraph contemplated that the Board should be armed "for carrying out the objects of this Act."

Whatever may be the true construction of the disputed clause, sections 68 and 69 can present no difficulty. They give a merely subsidiary power to acquire land just as sections 24 and 25 give the subsidiary powers of making contracts and spending money, and these subsidiary powers are conferred in order that improvement schemes (whatever they may comprise) and rehousing schemes may be carried out.

Under section 69 the power to acquire land compulsorily is given in the wide terms used in sections 24 and 25, "for carrying

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out any of the purposes of the Act." If that is a limitation, it is a limitation so wide in its extent, that if not expressed it would have to be understood. Anything which the Act permits or directs to be done will come within the phrase. Improvement schemes, "which the Board shall forthwith proceed to execute" are within it, and as regards acquisition there is no difference between land included under section 41 (a) and "affected" land (whatever the expression means) included under section 42 (a). Land of both kinds is acquired for carrying out one or other of the purposes of the Act and may for that reason be acquired either by agreement or compulsorily. It is said section 68 does not mention the purposes of the Act but empowers acquisition by agreement of "any land which the Board are authorised to acquire." Possibly those words were employed so as to include not only all the lands which may be acquired compulsorily under section 69, but also land which under clause (b) of section 50 may be acquired by agreement but not—without the formalities attendant on framing a scheme by compulsion. However that may be, section 68 cannot authorize the acquisition, even by agreement, of any land for carrying out some purpose which is not a purpose of the Act. The suggestion that "affected" land included in a framed and sanctioned scheme may be acquired by agreement under section 68 but not by compulsion under section 69 seems to be unfounded.

Section 78, with which must be read section 13 of the schedule, provides for the abandonment (in consideration of a special payment) of the acquisition of land, the acquisition of which has been sanctioned, in connection with some improvement scheme, but "which is not required for the execution of the scheme." These words read with sections 41 (a) and 42 (a) seem to point to land entered for acquisition in a sanctioned improvement scheme not as land "required for the execution of the scheme" under section 41 (a) but as land not required but "affected" under section 42 (a). Section 78 seems to pre-suppose that persons interested will know from the outset, or as soon as a scheme is published, what lands are "required" and what lands are "not required." This they will do if land "not required," signifies or includes "affected" land.

It is suggested that the section refers to land which is not required for carrying out a scheme because of some alteration made under section 50. But apart from the result of this interpretation to which I shall presently advert, the special provisions of section 78 seem too elaborate to be adequately accounted for in that way, inasmuch as it cannot be predicted that alterations will be numerous

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or important. Moreover, if it is the interest of the Board to withdraw from the acquisition of any land, the withdrawal will presumably take place at their own initiative under section 48 of the Land Acquisition Act. No owner is compelled to make an application under section 78 of the principal Act, and if he knew that the Board meant to withdraw he would probably refrain from doing so in order to escape from the special payment and in order to obtain any damages to which he might be entitled under section 48 of the Land Acquisition Act.

After land has been acquired or the title has vested, the Board may proceed under section 81, and this applies to all land—including affected land—which comes into the hands of the Board and is not required for the actual execution of a scheme.

Now if "affected" land includes land beneficially affected, acquired for purposes of recoupment, it will appear that such land might well be the special object of the powers conferred by these two sections.

If the relevant provisions be fairly construed, apart from any preconceptions as to what the legislature ought or ought not to have done, they show, I think, with reasonable certainty, that the Board were intended to have power to take land for purposes of recoupment and that section 78 and section 81, particularly the pre-emption clause, were enacted principally—though perhaps not wholly—for the benefit of the owners of such land. This construction leads to no inconsistency or repugnancy and gives the Act as a whole a reasonable and intelligible meaning.

The reference to this Bench has been occasioned by a difference of opinion in the Court on a pure question of construction, and that being so and this Bench not being altogether unanimous, I state my own opinion with diffidence. I am not however led to alter that opinion by any merits apparent in the alternative construction of the disputed clause which is offered. As Greaves J. has said, it all turns on the word "affected." If the significant word "injuriously" be in effect prefixed and the expression "affected by the execution of the scheme" be read as if it occurred in a section relating to the payment of damages and not in a section relating to the framing of an improvement scheme, the meaning so obtained is not the meaning of the words as they stand. This violent treatment of the clause seems to rest entirely on the series of English cases by which the true meaning of the words "injuriously affected by the execution of the works" in section 68 of the Lands Clauses

Consolidation Act, 1845, was settled (Cripps on Compensation 5th Edition p. 136).

According to this view the only purpose of section 42 (a) was to enable the Board to acquire land, in respect of which they might otherwise have to pay damages for injurious affection in cases in which such damages are claimable. But this is already partly provided for by clause (2) of section 49 of the Land Acquisition Act. This view, again, involves the interpretation of sections 78 and 81 in the manner already touched upon, according to which they were designed to enable the Board to make a profit out of the abandoned parts of their various undertakings, or to finance themselves out of land entered in their plans through errors of calculation or judgment.

The construction of section 42(a) on which this result depends does not appear to be admissible and the result itself compares unfavourably in point of probability with the result, so much canvassed, of giving to the words their natural scope and effect.

If an Act of this kind is to achieve its objects, the powers which must be taken are necessarily large and, *inter alia*, means must be furnished for raising the money required. At the present day there can be no initial improbability in finding in such an Act provision made for what is known as betterment, or for what is known as recoupment. Some such provision, if it exists, need create no surprise. The principle underlying betterment and recoupment has received legislative recognition in various Acts and in many ways. In practice it may be difficult to combine contribution with equality of treatment. In a case already referred to [*Harding v. Board of Land and Works* (1)], some violence was done to the strict grammatical meaning of the enactment there in question in order to prevent an inequality which might have extended to some land being taken without any compensation at all. It is one thing, however, to determine the true antecedent of a relative word like "such," and quite another thing to alter the language of the Act in the manner which is suggested as proper in the present case. Our duty is to construe the Calcutta Act as it stands without entering into questions of policy and expediency further than the language necessitates. In that Act no attempt is made to frame an elaborate and possibly costly scheme of contribution. The method adopted is an extension of the power to take land compulsorily, and there is at least this to be said, that a man whose land is taken for purposes of recoupment is in no worse case than the man whose land is taken for the actual execution of a scheme. The former has the benefit

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(1) (1886) L. R. 11 A. C. 208 (211).

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of sections 78 and 81 and though it is a benefit at which he may look with somewhat jaundiced eyes and may be pardoned for so doing, there it is.

Hardship in some degree may be inevitable in connection with any scheme or set of schemes involving the taking of land on a considerable scale in a great city. But the Act deprives no man of his property without compensation. The presumption that the legislature will not interfere with private rights without compensation is not in question.

I do not know what the position is, but it is at least conceivable that without the aid of recoupment the operations of the Board entailing an expense commensurate with the size and importance of Calcutta, would come to a standstill, so that there would be no improvement and expansion of the city in the interest of the present and future generations of citizens, and the Act would be a dead letter. If the construction of the Act is to depend on results, this consideration cannot be entirely neglected.

In conclusion I may be permitted to emphasize that if the power in question is discretionary, the duty and responsibility of carrying out the provisions of the Act and giving effect to the statutory purpose and directions are laid upon a Board of Trustees, specially constituted, and, that among other safeguards, the Act has been careful to ensure full publicity and full opportunity for the ventilation of objections to any improvement scheme which may be proposed.

I should also add that as regards the preliminary objection to the hearing of this reference, I agree with what has been said by my brother Fletcher. So long as the judgment in *Chandra Kanta's case* (1) stands, the Board cannot, as I understand that judgment, acquire any land compulsorily for purposes of recoupment.

In the circumstances, looking at the language and the objects of the Act, I am respectfully of opinion that, this power to acquire land for purposes of recoupment was within the contemplation of the legislature. I agree with Fletcher J. and concur in the answer which he proposes to give to the question referred.

Chaudhuri, J.—I think this reference to a Full Bench of this Court is competent, although one of the referring Judges considers the case of Chandra Kanta Ghose distinguishable to the extent that small portions of the land have been cut off in this case, whereas in that case no portion of the land was similarly treated, and another learned Judge may be said to have implied as much. The main question is whether the decision in *Trustees for Improvement of*

Calcutta v. Chandra Kanta Ghose (1), that the Calcutta Improvement Act V of 1911, B.C. does not allow the compulsory acquisition of land for recoupment is good law or not, and the reference is properly before us.

The question has been elaborately argued and practically the whole of the Act beginning from the preamble has been analysed and examined, but it seems to me that it is really a question as to the meaning of the word "affected" in section 42 of the Calcutta Improvement Act. Section 41 deals with matters which must be provided for in improvement schemes under the Act and section 42 with what may be provided for. "Improvement scheme" is defined in section 2 clause (f) as meaning a general improvement scheme, or a street scheme, or both. Section 36 lays down when a general improvement scheme and section 39 when a street scheme may be framed. In this case we are concerned with a street scheme but sections 41 and 42 deal with improvement schemes generally and no separate provision has been made in the Act for acquisition of land in respect of street schemes whereas in the Bombay Act IV of 1898, acquisition of land *necessary for or "affected" by the execution* of a street scheme has been dealt with together, in section 31 clause (a). These are dealt with separately in sections 41 and 42 of the Calcutta Act. The expression "affected" has apparently come from the Bombay Act, and although there is no express provision in the Bombay Act authorising recoupment, the same question has apparently not arisen under that Act.

It is quite clear that section 42 provides for acquisition of land which is not covered by section 41, namely, of land other than that required for the execution of the scheme. It provides for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be affected by the execution of the scheme. The learned Judges in *Chandra Kanta Ghose's case* (1) have said that "affected" is not a word of art, but of ordinary English, capable of very large meaning, adopting the language of Wills J. in *Buckinghamshire Co. Ltd. v. Hartfordshire Co. Ltd* (2). They think that having regard to the context it means "neither beneficially affected or improved in value, nor prejudicially affected or impaired in value," but signifies "acted upon physically or materially." They say that in this section affected land means land in respect of which there has been "physical interference with

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(1) (1916) I. L. R. 44 Calc. 219; 24 C. L. J. 246.

(2) (1899) 1 Q. B. 515.

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any right, public or private, which the owner is entitled to exercise in connection therewith." The words "physically or materially acted upon" quoted from the Oxford Dictionary have little to do with the physical interference in the passage above quoted which has been taken from the argument of Mr Thesiger on behalf of the defendant in error in *Metropolitan Board of Works v. McCarthy* (1), who used those words in connection with his definition of the right to compensation in respect of property *injuriously affected*, when he sought to reconcile and explain the various cases on the subject. The test submitted by the learned counsel was accepted by Lord Cairns (p. 243) and by Lord Chelmsford with qualification (p. 256) for purposes of the case before them. The words were used to define the expression "injuriously affected" in connection with property. The word "physical" was used to distinguish the case from cases of that class, where the interference complained of was not of a physical but rather of a "mental nature or of an inferential kind." The words "a right, public or private, which the owner of the property is entitled to make use of" were used to distinguish the case from such cases as the *Hammersmith Railway Co. v. Brand* (2). Although the learned Judges have said that "affected" in section 42 does not mean "prejudicially affected or impaired in value," they have really adopted the definition of "injuriously affected" given in *Metropolitan Board of Works v. McCarthy* (1). Section 42 does not deal with compensation, nor does it in any manner indicate that it relates to compensation. It supplements section 41 and provides for what may be included in an improvement scheme, in addition to what must. The sections relating to compensation come much later in a different chapter *viz.* chapter IV and schedule. Section 69 deals with compulsory acquisition under the provision of the Land Acquisition Act, 1894, modified as indicated in the schedule referred to in section 71 (b). If it was intended to place the Board in a position "to escape from the payment of damages" by allowing them to acquire severed or injuriously affected land in their improvement schemes, chapter IV or the schedule would have been the proper place for providing for it. Section 42 merely permits the inclusion of land in the scheme which in the opinion of the Board may be affected by the execution of the scheme. It does not say land affected by the execution of the scheme must be acquired. Whether the land will be affected or not is left to be considered by the Board. They have liberty to include what in their opinion may be affected, which may include more than what may be actually affected. They have, it is said, been

(1) (1874) L. R. 7 H. L. 243 (249).

(2) (1868-69) L. R. 4 H. L. 171.

so empowered "to escape from the payment of damages", namely damages for such physical interference with the land or its incidents which may lessen its value. The definition adopted includes interference with rights, public or private, which give an additional market value to the property apart from the uses to which the owner or occupier might put it; public rights such as the right of access to premises by a public highway, and private rights such as the obstruction of easements such as rights of way, of light, of support are included. The breach of restrictive covenants for the benefit of other land, and the prevention of the carrying out of covenants relating to land also come in. It seems to me that the definition adopted is vague and indefinite, and may include a great deal more than what the Land Acquisition Act as modified by this act provides for in respect of damages or compensation. It strikes me that if it was intended to safeguard the Board in respect of injuriously affected property, the Act would have clearly defined the matter, and not left it so vague. There can be no damages unless the property is impaired in value. The learned Judges have therefore really held that affected means "prejudicially affected or impaired in value," although they say at the outset of their judgment, that the word does not mean it. They say the opposite view may include "any land or all land in the area, for the whole area may be considered benefited by the scheme." They look upon this as a forced and unnatural contention. I did not understand the learned Advocate-General who appeared for the appellant to go so far. He conceded that the section may be read as providing for the acquisition of land, either beneficially or prejudicially affected, but his argument was that it related only to such land as the Board considered affected by *the execution of the scheme*, which he said were the governing words of the section. Section 41 deals with the land required for the scheme and section 42 with land affected by the execution of the scheme. If it is unnatural to hold that the legislature intended the Board to benefit by the acquisition of property beneficially affected or improved in value, it is also unnatural to hold that in discharging a public duty for the benefit of the public, the Board was provided with power to take up property prejudicially affected or impaired in value.

Sections 41 and 42 merely provide for the framing of schemes, which have to be notified under section 43. Notice as to the proposed acquisition has to be served under section 45, on persons interested, inviting their objections. The objections have to be considered by the Board under section 47, and then the sanction of the Government has to be obtained after setting out the objections.

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Sanction may then be given by the Government with or without modification under section 48. The sanction has to be notified by the Government (section 49) and then the Board is authorised to execute the scheme. Publicity of the scheme is provided for, objections have to be considered, and submitted to the Government and sanction can then be obtained. These are undoubtedly safeguards against undue interference.

The Board cannot proceed to acquire any land until the sanction has been notified as above.

Chapter IV deals with the acquisition and disposal of land. Section 68 deals with acquisition by agreement, and section 69 with compulsory acquisition, that is to say, the Act provides for acquisition in two ways, namely, by private treaty and compulsorily under the Land Acquisition Act. They both cover the same ground. They do not deal with different classes of land, namely, land necessary under section 41 or land considered affected under section 42. It seems quite clear that lands under both these heads may be acquired in either way. The learned Judges in *Chandra Kanta Ghose's case* (1) have emphasised the words *for carrying out any of the purposes of the act* occurring in section 69 as distinguishing it from section 68 where those words do not occur. They have in this overlooked the provision in section 24 which has to be read with section 68, which empowers the Board to enter into contracts *necessary or expedient for carrying out any of the purposes of the Act*, which really means necessary under section 41 or expedient under section 42. In discussing the purposes of the Act the preamble has been considered by them. I am unable to agree that "the rehousing of persons of the poorer and working classes displaced by the execution of improvement schemes" is a separate head of the objects of the Act. It comes under the head "The improvement and expansion of Calcutta." The punctuation shows that it is part of the sentence beginning with the words "acquiring land for the said purposes etc." The sentence following it is "and otherwise as hereinafter appearing" which does not run with it, if it is treated as a separate head, but it grammatically follows the portion governed by the preposition "by" after the words "expansion of Calcutta." Acquisition of land for purposes of recoupment is not specified as one of the objects of the Act. It is a means for effecting an object. It is not mentioned as an object in the preamble of the Acts which have been brought to our notice which explicitly provide for recoupment. It is scarcely to be looked for in the preamble. So far as the Calcutta Improve-

(1) (1916) 24 C. L. J. 246.

ment Act is concerned, section 42 clearly provides for acquisition of land other than required for the execution of improvement schemes. "Affected land" may be sanctioned by the Government to be acquired, but what it is to be done with such land? The acquisition may be "to escape payment of damages," but what is the Board to do with such property? Power of disposal by them is provided for by section 81, by which also the right of pre-emption is given to the owner of the land. Section 78 provides for abandonment of acquisition of land which is not required for execution of the scheme even after sanction in consideration of payment by the owner of a sum to be fixed by the Board which clearly covers land under section 42. This section may be compared with section 48 of the Land Acquisition Act which provides for payment of compensation when the acquisition is not completed. Section 78 provides for exaction of payment for abandonment, if the owner applies for it after the sanction for acquisition has been given and before the time fixed by the Land Acquisition Act for making claims in reference to the land. It clearly provides for recoupment. I think sections 78 and 81 taken together show that power to acquire land for recoupment has been given by the Calcutta Improvement Act, and in section 42, the word "affected" was deliberately used as a word having a very large meaning, "to give large powers of acquisition of land outside immediate requirements." Sections 89 and 91 deal with the power of the Board to borrow, including the power to grant mortgages of property vested in the Board and sections 122 and 123 deal with credits to capital account and the application of the capital account. The Act gives power to acquire superfluous land to demise and sell it, to return it on payment by the owner. For the above reasons I agree with the view taken by the learned Judges who have referred this case.

Babu Romesh Chandra Bose :—Solicitor for the Appellant.

Messrs. Morgan & Co. and Kesteven :—Solicitors for the Respondents.

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Reference answered in the negative.

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PRIVY COUNCIL.

PRESENT:—*Lord Dunedin, Sir John Edge, Mr. Ameer Ali*
and *Sir Walter Phillimore.*

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

MAUNG THWE

v.

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Burmese Buddhist Law—Adoption—Kittima son—Proof of adoption—Publicity of relationship—Separation and inheritance—Forfeiture of inheritance.

Under the Burmese Buddhist Law a child adopted according to the fullest form of adoption and retaining his status as an adopted child till the death of his adoptive parents is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *Kittima Tha*.

There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement or act made by his adoptive parents upon a particular date; but it must be a matter of publicity and notoriety. The fact of the adoption can either be proved as having taken place on a distinct and specified occasion or may be inferred from a course of conduct which is inconsistent with any other supposition. But the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.

A *Kittima* child may forfeit his right of inheritance by separating from his adoptive parents. But where there are no other children with whom the *Kittima* child seeks to compete or share the law allows him to inherit in whole or in part notwithstanding his separation. Separation working a forfeiture is a matter of intention. If the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after it, the bond is not broken.

Ma Me Gale v. Ma Sa Yi (1), and *Ma Ywet v. Ma Me* (2), followed.

Appeal from a judgment and decree (September 23, 1915) reversing a judgment and decree of the District Court of Tharrawaddy which decreed the plaintiff-appellant's suit.

The facts of the case are fully stated in the judgment of their Lordships.

Gerard S. Sanders for the appellant referred, on the question of adoption and proof of a *Kittima* son, to *Ma Sa Yi v. Ma Me*

(1) (1904) L. R. 32 I. A. 72; I. L. R. 32 Calc. 219.

(2) (1909) L. R. 36 I. A. 192; 10 C. L. J. 253.

Gale (1); *Ma Mein Gale v. Ma Kin* (2), and *Maung Shwe Thwe v. Ma Saing* (3). He submitted that the evidence established the appellant's adoption for which there was publicity. He further submitted that the appellant lived separate with the consent of his adoptive parents, and that he was ready and willing to perform, and has in fact performed, his duties to the adoptive parents as their adopted son. There was therefore no forfeiture: *Ma E. v. Maung Shwe Kaing* (4). He also referred to Chan-Toon's Buddhist Law, (1903 Ed.) p. 95; and Gaung's Digest of Burmese Buddhist Law, Vol. I, sections, 16, 190, 195, and 197 and 198.

Coltman for the Respondent submitted that the evidence did not establish that the appellant was a *Kittima* son entitled to inherit. In any case he submitted that the respondent was also a *Kittima* son and entitled to share the inheritance with the appellant. He referred to the following additional authorities: *Mah Thine v. Maung Bah Pe* (5), *Ma Me Gale v. Ma Sa Yi* (6), and *Ma Ywet v. Ma Me* (7).

Sanders replied.

The judgment of their Lordships was delivered by

Sir Walter Phillimore :—The litigation in this case concerns the succession to the estate of U Shwe Mya and Ma Shwe I, Burmans, professing the Buddhist faith, a wealthy married couple who died childless; the husband early in 1906, and the wife on the 9th of February, 1903. Upon the death of the latter a contest arose between the claims of Maung Thwe, a nephew of the husband, and Maung Tun Pe, a nephew of the wife, each claiming to be the sole adopted child and to succeed to the exclusion of the other.

After certain abortive police proceedings the contest took a regular shape, Maung Thwe being the applicant for administration and Maung Tun Pe resisting him and setting up his rival claim.

Much evidence was given before the District Judge, and he in the result decreed letters of administration to Maung Tun Pe, upon what ground does not appear.

Maung Thwe, being aggrieved by this decision, appealed to the Chief Court, which refused to hear the case upon the merits or to interfere with the order, the Judges stating that the decision as to

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(1) (1901) 2 Chan Toon's L. C. 181 (189).

(2) (1893) 1 Chan Toon's L. C. 168.

(3) (1899) 2 U. B. R. 135.

(4) (1899) 2 Chan Toon's L. C. 151.

(5) (1896-97) 2 Chan Toon's L. C. 53. (6) (1904) L. R. 32 I. A. 72.

(7) (1909) L. R. 36 I. A. 192.

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administration would not operate as *res judicata*, and that it would be open to Maung Thwe to establish his right in other proceedings.

Thereupon the present proceedings were instituted by Maung Thwe against Maung Tun Pe as administrator, Maung Thwe setting forth his title as an adopted son and sole heir to the estate, complaining that Maung Tun Pe wrongfully refused to deliver the estate to him, and praying for a declaration that he was the sole heir and for consequential relief.

Maung Tun Pe put in a defence, in which he denied the plaintiff's adoption and all the other allegations in the plaintiff's claim, stated that he was the only adopted son and heir, having been adopted in his infancy, and prayed that the suit might be dismissed.

The District Judge, who was not the same Judge before whom the administration proceedings had been taken, framed three issues, which were as follows :—

1. Who of the claimants to the estate should be recognised by Buddhist law of inheritance as heir to the estate of deceased U Shwe Mya and Ma Shwe I ?
2. Have either or both of them been adopted ?
3. What is the extent and value of the estate of the deceased U Shwe Mya and Ma Shwe I ?

By agreement between the parties the evidence in the previous case was read as evidence in this case, some of the witnesses being further examined and cross-examined, and one or two fresh witnesses being added.

By his judgment dated the 12th January, 1911, the District Judge declared that Maung Thwe was the sole adopted *kittina* son of the deceased couple and their sole heir, and directed consequential accounts and enquiries. And by a subsequent order, dated the 3rd May, he directed Maung Tun Pe to transfer to Maung Thwe the property of which he had become possessed as administrator.

From these decrees an appeal was taken to the Chief Court of Lower Burma, which, by its judgment dated the 23rd September, 1913, allowed the appeal, reversed the decrees, and dismissed Maung Thwe's suit with costs in both Courts.

The Chief Court found that Maung Thwe had not proved his adoption, and that it became therefore unnecessary to decide whether Maung Tun Pe had or had not proved his adoption, as he was in possession and the plaintiff had failed to prove a title against him.

From this judgment of the Chief Court Maung Thwe has appealed to His Majesty in Council.

Maung Tun Pe has died during the course of these proceedings, and his legal representatives are now parties to this appeal as respondents.

It appears to their Lordships unfortunate that the Chief Court should have failed to enquire into the rival claim of Maung Tun Pe. The previous decision of the same Court had in substance decided that when the merits of the respective claimants to the beneficial interest in the estate came to be considered, neither was to have an advantage by reason of his having previously obtained administration. And yet, in the present case, the Chief Court treated Maung Tun Pe as if he were in possession and in a position to win his case without any proof of title, upon the mere weakness of the title of the other claimant. The only way to handle the case after the previous decision was to treat the two parties as competitors, starting upon an equal footing.

Their Lordships proceed to examine the case of the two parties upon this principle.

The Burmese Buddhist Law in the matter of adoption and inheritance has been the subject of discussion in several cases in the local Courts and before this Board.

A child adopted according to the fullest form of adoption and retaining his status as an adopted child till the death of his adoptive parents is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *kittima tha* or *kittima* child.

The word is sometimes written *keitima* and seems to be a corruption of the Sanskrit *kritrima*.

There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement or act made by his adoptive parents upon a particular date. But on the other hand, the adoption must be a matter of publicity and notoriety.

It is unnecessary to state all the authorities upon this subject, as the matter has twice in recent years come before this Board, in the cases of *Ma Me Gale v. Ma Sa Yi* (1), and *Ma Ywet v. Ma Me* (2).

To quote a passage from the last judgment, the fact of adoption "can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct

(1) (1904) L. R. 32 I. A. 72.

(2) (1909) L. R. 36 I. A. 192.

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which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to."

It is most important that adoption with a view to inheritance, which, in this community, takes the place of testamentary disposition, should be made known to all those likely to be concerned; and their Lordships are anxious in no way to weaken what has been stated to this effect in former decisions.

There is a further principle of law with regard to kittima children, to which attention has been drawn in the course of the argument.

A kittima child may, according to the authorities, forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude. The texts are set forth in section 195 of Mr. Gaung's "Digest of Burmese Buddhist Law."

These authorities, however, draw a distinction between the cases where there are other children with whom the kittima child seeks to compete and share, and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation.

This points to the true principle upon which the rule of forfeiture rests. It is a matter of intention. If the kittima child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents, and has given up with his duty his claims upon their estate; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate.

The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge duties to his adoptive parents, and in that case it probably works a forfeiture.

But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken.

This is the result of the modern decisions which are quoted in Chantoon's "Principles of Buddhist Law," pp. 88 to 95. To these may be added a decision in the Appeal Court of Upper Burma in the case of *Maung She Thwe v. Ma Saing* (1).

(1) (1899) 2 U. B. R. 135; 2 P. J. L. B. 520.

The general outline of the case on behalf of Maung Thwe was that he was residing with his parents at a distance of about a day's journey from the residence of his adoptive parents, that they came to his house when he was about 17 years old, stayed there for a day or two, and then asked for him in adoption; that certain elders were called in as witnesses of the act of adoption, and that then he went away to his adoptive parents and never returned to his native village.

As he appears to have been born about 1880 that would make the date of his adoption about 1897 or 1898.

In support of this case, besides his own evidence there was that of his father and the three fellow villagers who had been the witnesses to the adoption, two of whom were people of some position in the village.

He stated that he lived continuously with his adoptive parents till his marriage, which took place when he was about 25, some nine months before the adoptive father died. He relied upon the card of invitation to his marriage which was issued by his adoptive parents, upon statements made at the marriage by the adoptive father to the effect that he was his heir, and upon the testimony of several witnesses, tenants and others, who deposed to statements by the parents that Maung Thwe was their adopted son, and that tenants were to treat him as such, and pay rent to him; and he gave other evidence of repute.

The line taken up on behalf of Maung Tun Pe was that he, as a much younger boy, could know very little about the facts alleged by his rival and required strict proof. There was much criticism of the character and statements of the witnesses for Maung Thwe. It was contended that the statements on the invitation card did not support the view that Maung Thwe was a kittima child, and it was pointed out that this card was the only piece of documentary evidence that Maung Thwe could put forward.

It was beyond question that after Maung Thwe's marriage he went to live with his wife's mother. He stated that he continued to discharge such duties as his adoptive parents required of him, and that it was part of the arrangement upon his marriage which was made with the consent of his adoptive parents, that he should go and live with his mother-in-law.

On the other side it was contended that this separate living was fatal to Maung Thwe's case, either as working a forfeiture, or as showing that there never had been a kittima adoption.

The affirmative case of Maung Tun Pe was that his mother lived in the same village as the adoptive parents, and had been visited by

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them shortly after his birth, when they had agreed to adopt him after he had been reared through his tender years, that the actual adoption began when he was twelve or thirteen years old, from which time he lived sometimes with his own parents and sometimes with his adoptive parents. He said that his adoptive parents paid his school fees, provided for a hospital doctor when he received an injury, and accepted publicly the position of parents when the ceremony of *Shinbyu* was performed. This ceremony, which ends in the boy entering for a time a Buddhist monastery, is one which a Buddhist boy goes through upon attaining puberty.

His case further was that after the adoptive father's death he resided regularly with the widow; and that she put his name into the leases with the tenants, thereby showing either that he was heir to the property, or that he was already entitled to a share as representing his deceased adoptive father.

Maung Tun Pe was said to be about eighteen when the father died in 1906, which makes his birth about 1888.

Maung Thwe said that Maung Tun Pe never lived in the house of the adoptive parents during the father's lifetime.

On the other hand, Maung Tun Pe said that Maung Thwe did not live in the adoptive parents' house, but in his natural parents' village, and only sometimes visited them when on a journey.

The District Judge accepted the affirmative evidence for Maung Thwe. The Judges in the Chief Court looked at it with more suspicion, and thought that the evidence of the supposed act of adoption was improbable, that the witnesses put forward as elders were not of the authoritative class that one would expect, and that there were discrepancies in the statements of the witnesses as to what took place at the marriage.

They accepted the evidence that for some years before the father's death Maung Thwe had resided a great deal, if not permanently, with the old couple, and helped them in their business, but they said that it would be natural that he, as a nephew, should do this.

The officiating Chief Judge thought that it was not usual to adopt at so late an age as 17, and then observed, somewhat inconsistently, that the old couple might have taken him with them with an intention to adopt him later if he proved suitable, but that when they married him off that idea was abandoned.

The second Judge laid a good deal of stress on Maung Thwe's having gone to live apart from his adoptive parents, and of the acts

of the widow indicating that she wished Maung Tun Pe to succeed to her property, as showing that the other had not been adopted.

Both Judges relied upon the language of the card of invitation as being hurtful to the case of Maung Thwe, and the District Judge thought that it was not helpful to his case, though, on the other hand, it was not fatal to it.

The language of this card, omitting unimportant words is in the translation as follows :—

“As according to the duty of parents it is desired to marry Maung Thwe, the nephew son of U Shwe Mya and Ma Shwe I, and Ma Nyin Ma, daughter of Ma Shwe Hluing, you are invited to come to the marriage ceremony.”

Then the date is given, and the residence of the mother-in-law as the place.

Nephew son is a translation of Tu Tha. *Tha* is “son” simply, and *Kittima tha* is “fully adopted son.”

There is no doubt that Maung Thwe was a nephew, and nephew son was not inapplicable though it might be inadequate.

It is clear that too much stress must not be laid on the word *son*, because the Burmese are proverbially inexact in their terms of relationship ; but its use is of some assistance to Maung Thwe's case.

On the other hand, the statement that the marriage was being made according to the duty of parents, seems to show that the old couple who issued the invitation were accepting the duty of parents ; and so the District Judge views the phrase.

Their Lordships are unable to hold that much inference can be drawn one way or the other from the language of the invitation card, which seems consistent with either hypothesis ; that is, either that Maung Thwe was an adopted son, or that he was a nephew who had been taken by the old couple to live with them, and to whom they had put themselves under obligation, which they were discharging by providing for his marriage. But they would observe that either of these positions—and one of them is certainly right—is inconsistent with the story deposed to by the witnesses for Maung Tun Pe.

Their Lordships see no reason for differing from the District Judge in his acceptance of the story of the witnesses as to the statements made at the marriage by the adoptive father ; and if they are accepted, they go a long way to prove the adoption.

The view taken by the Chief Court is in substance that the proof was insufficient. The officiating Chief Judge has a very long experience of Burmese habits and customs ; and it has been urged

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on behalf of the respondents that his decision upon such a subject is of special authority.

Their Lordships feel the force of this argument ; but they would have attached more weight to it if the Chief Judge had examined the case of Maung Tun Pe in the same manner as he has examined the case of Maung Thwe. They are inclined to think that if he had applied the same critical solvent to the one story as to the other, he would have come to the conclusion that neither had proved an adoption ; and this is a consequence in itself improbable, and one for which neither side has contended.

As to Maung Thwe living separately after his marriage, it has not been contended before their Lordships that it was a separation which worked a forfeiture, if there had been a prior adoption. It appears that it was always intended that the marriage should be followed by Maung Thwe going to live with his widowed mother-in-law, and the marriage took place not only with the consent but upon the request of the old people, who apparently first came themselves and then sent an intermediary to beg for the hand of the girl. Maung Thwe deposed that he used to help the couple after his marriage, and it was admitted that he was called in by the widow on an occasion when she was in trouble. There was evidence that he and his wife, when the adoptive father was taken ill, went and nursed him till his death ; and throughout his cross-examination no specific failure of duty was put to him.

Upon the whole their Lordships attach no weight to the separate residence, either as working a forfeiture or (as it was rather put before them) as indicating that there never had been an adoption ; and they are of opinion that Maung Thwe did make out that he was an adopted child and an heir to the old couple.

But whether he was the sole adopted child and heir is another question. The District Judge thought that he was, and that Maung Tun Pe had not made out his case ; and Maung Tun Pe has not the assistance of any finding in his favour in the Chief Court. But he has strong documentary evidence in the fact of the leases, in which his name appears with that of the widow after the adoptive father's death.

Some, at any rate, of the leases have been proved to be genuine and to have been effected under the authority of the widow. There is a good deal of evidence that the adoptive father took a principal part in the ceremony of *Shindyu*, though the natural father was also present. The providing of the hospital doctor was proved, and there seems no doubt that, after the adoptive father's death,

Maung Tun Pe, having by that time arrived at an age when he could be useful, did most of her ordinary business for the widow.

Maung Tun Pe's case has this weakness, that the supposed original adoption was made without witnesses. The District Judge commented with force upon the fact that the act of adoption—if there was any one single act—was not witnessed by any elder or any other person in authority, and was a wholly private transaction, and he came to the conclusion that there was no adoption by U. Shwe Mya. He thought it not improbable that Ma Shwe I may have intended to have adopted Maung Tun Pe after she became a widow, but, having regard to the fact that there was already one adopted son, he thought that more proof than that supplied would be necessary to establish a subsequent adoption by the widow.

Their Lordships have been informed by counsel for Maung Thwe that he does not contend that there would be any legal objection to the widow adopting a second heir, or that the position of a son so adopted would be in any way inferior to that of the first adopted son.

After consideration of the evidence, they have no doubt that, at the death of the widow, Maung Tun Pe was also an adopted son. It would be difficult to fix a date when this adoption began, or, to say with certainty, whether it was the act of the couple or of the widow only. The stronger evidence for it is to be found in what happened after the adoptive father's death. This might point to a subsequent adoption, but it would also be consistent with a previous adoption, the evidence for which it has not been so easy to procure.

Upon the whole their Lordships come to the conclusion that both of the claimants were adopted heirs. This being so, either in turn has asked for too much, and each should bear his own costs of the litigation.

Their Lordships will therefore humbly advise His Majesty that the decree of the Chief Court should be reversed, that it should be declared that Maung Thwe and Maung Tun Pe were heirs to the estate of U Shwe Mya and Ma Shwe I as their kittima sons, and that the case should be remitted to the District Court with this declaration, and that there be no costs in either of the Courts below or of this appeal.

Bramall and White :—Solicitors for the Appellant.

H. Anderson :—Solicitor for the Respondent.

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Appeal allowed in part.

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APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

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January, 12, 15, 16.

THE BENGAL STONE COMPANY LD.

v.

JOSEPH ISAAC JOSEPH HYAM AND ANOTHER.*

Contract—Contract Act (IX of 1872), Sec. 15—Coercion—Refusal to convey equity of redemption—Costs—Solicitor.

A refusal to convey the equity of redemption except on certain terms, is not an unlawful detaining or threatening to detain property to the prejudice of a person, within the meaning of section 15 of the Contract Act.

The discretion of a Court upon the question of costs has to be exercised judicially, and the ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other.

A solicitor bringing or defending an action in person is entitled to the same costs as if he had employed a solicitor except in respect of items which the fact of his acting directly rendered unnecessary.

London Scottish Benefit Society v. Chorley (1) referred to.

Appeal by the Defendants.

Suit for an account.

Messrs. Buckland and Surita for the Appellants.

Messrs. Hyam and S. N. Ghose for the Respondents.

The material facts are stated in the following judgment of

January, 16.

Sanderson, C. J.—This was an action brought by the plaintiffs for an account in respect of certain building transactions which were undertaken by the defendants for the plaintiffs, Mr. Hyam and Mr. Jones. Those building transactions were undertaken in pursuance of an agreement dated the 21st. of January 1909. It is not necessary for me for the purpose of this case to deal in any detail with the terms of that agreement. It is sufficient for me to state that the defendants, The Bengal Stone Company Ltd., were to erect two sets of premises, one in Park Street, and the other in Bow Bazar Street, and that they were not to be liable to spend on all accounts more than a specified sum of money, and, the method of payment was

* Appeal from Original Decree No. 52 of 1916, against the decree of Mr. Justice Imam, sitting on the Original Side.

(1) (1884) 13 Q. B. D. 872.

that "the owners (the plaintiffs in this case) should pay the Stone Company (the defendants) for all materials the actual cost price thereof *plus* all charges and expenses actually paid or incurred by the Stone Company in collecting and placing the same on site and also the actual cost of all labour employed by the contractors in or about the erections of the buildings and of completing and equipping the same in terms of the agreement." There were provisions for the remuneration of their services in respect of supervision and other matters, and then the payment of a sum equal to ten per cent on the aggregate amount of all the items specified in the said clause of the agreement was provided for. The buildings were completed although not within the specified time. There was also a provision in the agreement that a mortgage should be given by the owners, of one of the premises to secure a sum of money which was eventually agreed upon Rupees 2,50,000.

Now, this action was brought, as I have said, primarily for an account. When it came on for trial, there were really two main questions ; *first*, the point raised by the defendants, that there had been an account stated between the plaintiffs and the defendants, and that consequently the plaintiffs were not entitled to an account ; and, *secondly* the point raised by the plaintiffs that a certain letter which was dated the 22nd of August 1911 was obtained from the plaintiffs by the coercion of the defendants. That was a letter in these terms.

"In consideration of the Bengal Stone Co., Ltd. this day reconveying and releasing the premises Nos. 294 and 295 Bow Bazar Street mortgaged by us to the Bengal Stone Co. Ltd., we hereby admit and acknowledge that the said Reconveyance and Release only relates to the said premises Nos 294 and 295 Bow Bazar Street, and we hereby undertake to pay to the said Bengal Stone Co. Ltd. not later than the 31st. December 1911 any sum which may hereafter be found to be due from us to the said Bengal Stone Co Ltd. under or in connection with the agreement dated the 21st. January 1909 and made between the said Bengal Stone Co. Ltd, of the one part and ourselves of the other part. We hereby also agree to forego any and all claims that we may have had or have against you in respect of delays in completion of the buildings at Park Street and Bow Bazar Street and will only make such corrections in your bills and accounts as we may find to be erroneously or excessively charged. All other items of the contract agreement dated 21st. January 1909 to be considered as in force."

Now, those were the two main issues that were to be tried by

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the learned Judge, and I must say I am distressed to think that this action took no less than sixteen days in trial. In my view, it should have been obvious, unless the learned Judge was satisfied that there had been an account stated between the parties, that there must be a reference for the purpose of an account to be taken between the parties, and how the case which (with the exception of one or two subsidiary matters the facts relating to which lay in a small compass) was limited to these two questions, *first*, whether there had been an account stated and *secondly*, whether the letter of the 22nd of August 1911 had been obtained by coercion could have taken sixteen days for trial, is certainly beyond my comprehension.

Now, with regard to the first point, the learned Judge has found that there was not an account stated. We have heard the arguments on the one side as well as on the other, we have read the learned Judge's judgment, and the facts to which he referred, and have heard the facts put forward by the learned counsel for the defendants, and I think, even assuming the facts which he has stated, that there was not an account stated between the parties : and, for this reason we did not think it necessary for him to go through the evidence as he had offered to do.

With regard to the other point, we agree with the learned Judge that the letter of the 22nd of August 1911 was not obtained by coercion. The section upon which this matter depends is section 15 of the Indian Contract Act. In order to understand that section it is necessary to refer to sections 13 and 14. Section 13 says, "Two or more persons are said to consent when they agree upon the same thing in the same sense." Section 14 says "Consent is said to be free when it is not caused by—(1) coercion, as defined in section 15, or (2) undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of sections 20, 21 and 22." The only subsection of section 14 which can be said to apply to this case is sub-section (1) namely, "Coercion, as defined in section 15." Section 15 says, "*Coercion* is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." It is admitted that the present case does not come within the meaning of the first part of that section, namely "the committing, or threatening to commit any act forbidden by the Indian Penal Code." But it is said that what

happened in this case, to which I will refer more in detail directly, brings the matter within the words 'unlawfully detaining or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.' What happened in this case was this, shortly stated, Mr. Hyam and Mr. Jones had mortgaged this property at Bow Bazar Street to the defendants for Rs. 2,50,000. Mr. Hyam was anxious—Mr. Jones was away and Mr. Hyam was acting on behalf of Mr. Jones—to sell the premises, and apparently he got a purchaser, but he was not a very willing purchaser, and it was necessary for him to get the equity of redemption conveyed to him by the mortgagees. There was a discussion first of all as to whether Mr Hyam would give a promissory note—I ought to have said that the defendants were alleging that the total of their bills would amount to a considerable sum above Rs. 2,50,000. He was unwilling to give the promissory note. Then an arrangement was come to whereby Mr Hyam agreed to pay over the balance of the purchase-money, after deducting the amount which would be required for the first mortgage of the property, and also a sum of Rs. 4,000 as brokerage. It would have about Rs. 2,80,000 and he agreed to pay over that. Now, he alleges that that discussion amounted to "a threatening to detain any *property* to the prejudice of any person with the intention of causing any person to enter into an agreement." The *property* which Mr. Hyam, the learned counsel who argued the case on behalf of the respondents, relied upon was the equity of redemption; and, he said that the defendants threatened to detain the equity of redemption and there was an "unlawful detaining or threatening to detain," inasmuch as the defendants were refusing to convey the equity of redemption unless they were paid more than the sum secured by the mortgage. In my judgment, that was not unlawfully detaining or threatening to detain any property, within the meaning of section 15.

With regard to the law of duress in England, it is well-known that that was limited, and no doubt for very good reasons limited to the duress of person, and I may quote the following passage which I find stated in a convenient form at page-351 of the third edition of Leake on Contract, "Duress may also consist of threats of personal violence. But the fear must concern the safety of the person of a man; and not his house or goods, because he may recover the same, or damages to the value, without any corporal hurt. Again, if the fear do concern the person, yet it must not be a vain fear, but such as may befall a constant man. Fear of imprisonment is sufficient, for the law has special regard to the

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safety and liberty of a man," (That is a quotation from Co. Lit. 2536). Apparently, when the legislature was considering this matter for the purpose of applying the law to India, they thought it right to extend it and not to limit the law of coercion to a coercion of a man's person but extended it beyond the law of England to unlawfully detaining or threatening to detain any property. I ask myself, can it ever have been intended to apply it to such a transaction as has occurred in this case? Can it be said that when a person who has refused to convey the equity of redemption except on certain terms has unlawfully detained or threatened to detain any property within the meaning of section 15 of the Indian Contract Act. Having regard to the ordinary meaning of the English language, I have no hesitation in saying that the refusal to convey the equity of redemption except on certain terms, did not come within the meaning of section 15. I think that the learned Judge was right in saying that what took place in this case did not amount to coercion. Therefore I think that the plaintiff's cross-objection upon the question of coercion fails.

Then Mr. Hyam for the plaintiffs raised two other points which I may describe as less important points. The first one was that the learned Judge was wrong in finding that the defendants were not bound to charge the rates of labour which were specified by the letter of the 22nd of December, 1908. I think that the learned Judge was right. That letter, as I have said, was written on the 22nd December 1908, and the contract was not made until the 21st of January, 1909. I have read the clause which relates to the rate of labour, I read it again to make my meaning clear. "The owners should pay also the actual cost of all labour employed by the contractors in or about the erections of the buildings and of completing and equipping the same in terms of this agreement." In my judgment that is a clause which governs this matter, inasmuch as it was made subsequently to the 22nd of December, 1908; I do not think it is possible for us to say that it was implied that the rates of labour specified in the letter of the 22nd of December were to be incorporated in the contract. If it had been so intended one would have expected the contract to contain some such words as these "that the owners should pay also the actual cost of all labour, having regard to the rates of labour which had been agreed upon between the parties on the 22nd of December, 1908."

The other point was that the learned Judge misunderstood the evidence with regard to the steam-plant. What he says is this, "In respect of the steam plants I accept the version put forward by the

defendant company, and I hold that they are entitled to charge the plaintiffs Rs. 150 per plant per month for the actual period during which the steam plants were working on the sites." We have been referred to the evidence. In my judgment there was sufficient evidence on which the learned Judge could arrive at that conclusion, and I see no reason for interfering with his decision upon a question of fact in that respect. That disposes of the main points that were raised in this appeal. As I have already said, it must have been obvious from the beginning of the case as it was obvious from the beginning of the appeal that the matter must ultimately go to reference : and, the result is that the matter must now go to the Official Referee, unless the parties agree upon some other person who can take an account quicker and more expeditiously : and, after considering the arguments on both sides, I think that the learned Judge was right in the form of the order by which he directed it. It has been read by Mr. Buckland at my request, and I do not propose to read it again. I do not think that the form of the order as to the account ought to be interfered with at all

Then comes the question of costs. The learned Judge made an order as to the costs in these terms, "It is further ordered and decreed the defendant Company do pay to the plaintiffs their costs of this suit upto and including this decree to be taxed by the Taxing Officer of this Court under the heading 'Class 2 ordinary causes.' In my judgment that was not a correct direction as regards the costs. There was a clear and distinct issue raised by the plaintiffs that the letter of the 22nd of December, 1911, had been obtained by the coercion of the defendants. The learned Judge has not given any direction as to the costs of that issue : and, although the plaintiffs failed upon that issue, he has given the plaintiffs the costs of the whole trial of the action. Now, it is quite true that this Court is most averse to interfere with the discretion of a learned Judge upon the question of costs. But the discretion of the learned Judge upon the question of costs has to be exercised judicially, and the ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other. That is not the case here : It was a quite clear and distinct issue in this case, quite apart from the rest of the case. I have asked myself what good cause there was for depriving the defendants of the costs of that issue. I find none. Therefore I think the learned Judge was not

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right in the exercise of his discretion in depriving the defendants of the costs of that issue without a good cause. In my judgment, the defendants ought to have the costs of the issue relating to the question whether the letter of the 22nd of August, 1911, was obtained by coercion. But it would be difficult, in view of the protracted nature of the trial as pointed out by Mr. Hyam the learned counsel for the plaintiffs, for the Taxing Officer at this stage, without going into the matter at length and putting the parties to a considerable expense, to come to a satisfactory conclusion as to what costs should be allocated to the issue of coercion, and I think we shall be doing substantial justice if we direct that one-third of the costs of this suit ought to be allocated to the issue of coercion and two-thirds of the costs ought to be allocated to the other issues.

Therefore, as regards the costs of the suit, I think the plaintiff ought to have two-thirds of the costs of the suit and the defendants ought to have one-third; and, the costs ought to be taxed upon that basis, for the reason that the defendants have succeeded on the issue of coercion and the plaintiffs have succeeded upon the issue, whether there was an account stated.

As regards the costs of this appeal, I think that each party ought to bear his own costs for the reason that the plaintiffs have failed in part and the defendants have also failed in part and both the defendants and the plaintiffs have succeeded to some extent.

As regards the costs of the reference, those costs will be in the discretion of the Official Referee or the person who takes the reference.

As regards the last point taken by Mr. Buckland on behalf of the defendants, mainly that there ought to be a special direction as regards the costs of Mr. Jones, the point is this:—It appears that Mr. Jones is a solicitor, and that at one time he was in partnership with Mr. Mitter, carrying on business under the name of Jones & Co.; Mr. Mitter died early in these proceedings, it is said before the affidavit of documents was put in. Therefore, substantially, we may say that, Mr. Jones was acting as solicitor in this case on behalf of the plaintiffs. The question is whether we ought to give a direction to the Taxing Officer to tax the costs upon the principle of the rule which is laid down in the case of *London Scottish Benefit Society v. Chorley* (1). That was an action brought against the solicitors for money not accounted for. The learned Judge, Sir William Brett, Master of the Rolls, said this: "It is true, however,

(1) (1884) L. R. 13 Q. B. D. 872.

to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist, he cannot be charged for the solicitor consulting himself or instructing himself or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction, that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances." The report says "an ordinary litigant appearing in person" which is a mistake, as appears from the title of errata and should read by an ordinary litigant appearing by a solicitor. The rule laid down by this case and affirmed in *Tolputt & Co. v. Mole* (1), is that the solicitor is entitled to the same costs as if he had employed a solicitor except in respect of items which the fact of his acting directly rendered unnecessary. We propose to give a direction to the Taxing Officer that he should tax the costs of Mr. Jones upon the principle laid down in that case.

We think that the costs of the paperbook in the appeal should be equally divided between the parties in this case.

Mookerjee, J.—I agree.

Orr, Dignam & Co.—Attorneys for the Appellants.

Jones & Co.—Attorneys for the Respondents.

A. T. M.

Decree varied.

(1) (1911) 1 K. B. 836.

CIVIL.
1917.
The Bengal Stone
Company Ltd.
v.
Joseph Hyam.
Sanderson, C. J.

CRIMINAL REVISION.

Before Mr. Justice Teunon and Mr. Justice Richardson.

DEBENDRA NATH DAS GUPTA

v.

REGISTRAR OF JOINT STOCK COMPANIES.*

Indian Companies Act (VII of 1913), Sec. 134—Joint Stock Company—General meeting of the shareholders, not held during the year—Balance sheet, not placed before the Company—Balance sheet, not filed with the Registrar of Companies—A Director of the Company, if liable for the default—Company,

*Criminal Revision, No. 503 of 1917, against the order of K. B. Das Gupta Esq., Fourth Presidency Magistrate, Calcutta, dated the 4th April, 1917.

CRIMINAL.
1917.
June, 7.

CRIMINAL.

1917.

Debendra

v.

Registrar of Joint
Stock Companies.

situate outside the Presidency Towns—Presidency Magistrate, jurisdiction of, to try the offence.

A Director of a Joint Stock Company is liable to be convicted under section 134 clause (4) of the Indian Companies Act in respect of a default made in filing with the Registrar of Companies an audited balance sheet for the year, although there was no general meeting of the members of the Company, and no balance sheet was accordingly laid before the Company as required by the Act.

Park v. Lawton (1) referred to.

Held also, that the office of the Registrar with whom the balance sheet should be filed being in Calcutta, the Presidency Magistrate in Calcutta has the jurisdiction to try the offence under section 134 of the Act

Criminal Revision.

The petitioner, Debendra Nath Das Gupta, was one of the directors of a Joint Stock Company, known as the Darjeeling Press Company Limited, having its registered office at Darjeeling. He was tried before the Fourth Presidency Magistrate of Calcutta under section 134 clause (4) of the Indian Companies Act, for a default in filing with the Registrar of Joint Stock Companies an audited balance sheet for the year 1914-15. His defence was that as there was no general meeting of the members of the Company in that year, no balance sheet was accordingly laid before the company, and it was impossible for him or the company to comply with the requirements of section 134 of the Act. He further pleaded that the Presidency Magistrate of Calcutta had no jurisdiction to try the offence alleged to have been committed by him. The learned Magistrate convicted him under the section, and sentenced him to pay a fine of Rs. 30 only and in default to undergo simple imprisonment for 30 days.

Against that order the Petitioner moved the High Court, and obtained the Rule.

Mr. J. B. Sen Gupta and *Babu Probodh Kumar Das* for the Petitioner.

Mr. Camell (Acting Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was as follows :

In this case it appears that the petitioner was one of the directors of a Joint Stock Company known as the Darjeeling Press Company Limited. He has been convicted under section 134 (4) of the Indian Companies Act, VII of 1913 in respect of a default made in filing with the Registrar the balance sheet for the year 1914-15.

(1) (1911) 1 K. B. 588.

June, 17.

It is not disputed that as a matter of fact in respect of the filing of the balance sheet with the Registrar of Companies a default was made, and the defence of the petitioner as placed before us is that in fact in that year there was no general meeting and that being so no balance sheet was laid before the company at any such general meeting. His contention then is that these preliminaries not having been fulfilled it was impossible for him or his company to comply with the requirements of section 134, and that he should have been convicted, if at all, not under section 134 but under section 76 or 131. But it is not disputed and in fact it is admitted that as one of the directors the petitioner himself was responsible for enquiring that all the necessary preliminaries to be observed prior to the filing of that balance sheet with the Registrar had been duly observed; and that being so on the principles laid down in the case of *Park v. Lawton* (1), we are of opinion that we ought to hold that it is not open to the petitioner to plead in answer to a charge under section 134 his prior default in respect of the calling of the prescribed general meeting and of placing before the company at such meeting a duly prepared and audited balance sheet.

The second contention on behalf of the petitioner is that if he had been prosecuted under section 76 or section 131 of the Act, the Presidency Magistrate in Calcutta before whom his conviction has been had would have had no jurisdiction to try the offences charged under those sections and that the jurisdiction would have been exclusively with the Magistrates in Darjeeling. However that may be that does not take away the jurisdiction which the Presidency Magistrates in Calcutta clearly possess in charges under section 134, the office of the Registrar with whom the balance sheet should be filed being in fact in Calcutta.

For these reasons we discharge this Rule.

A. N. R. C.

Rule discharged.

(1) (1911) 1 K. B. 588.

CRIMINAL.

1917.

Debendra

Registrar of Joint
Stock Companies.

Before Mr. Justice Teunon and Mr. Justice Newbould.

CRIMINAL.

1917.

March, 16.

SAKHAYET ALI MUNSHI AND OTHERS

v.

ALHADI HAZI AND OTHERS.*

Criminal Procedure Code (Act V of 1898), Sec. 145—Evidence of possession—Oral evidence.

In a proceeding under the provisions of section 145 of the Code of Criminal Procedure the trying Magistrate had not given either party any opportunity of adducing oral evidence in support of the possession which they claimed :

Held, that the cardinal principle in such proceedings is that both parties must be given an opportunity of adducing such evidence as they are advised to give.

Criminal Revision.

Application under section 435 of the Code of Criminal Procedure by the 2nd party, praying that the order of the Sub-divisional Magistrate declaring, under section 145 of the Code of Criminal Procedure, the 1st party to be in possession of the disputed land might be set aside.

Babu Khitish Chandra Neogy for the Petitioners.

Babu Jogendra Kumar De (for *Babu Birendra Chandra Das*) for the Opposite Party.

The judgment of the Court was delivered by

March, 16.

Teunon, J.—In this Rule the District Magistrate of Dacca has been called upon to show cause why an order made under the provisions of section 145 Criminal Procedure Code in favour of the first party in a proceeding taken under the said section should not be set aside practically on the ground that the trying Magistrate had not given the petitioners, or indeed either party any opportunity of adducing oral evidence in support of the possession which they claimed. That this ground is well founded is apparent from the order sheet of the case and also from the ill advised explanation which the Sub-divisional Magistrate has submitted. He says, "I have learnt from painful experience that evidence as to possession of land is one of the most fruitful sources of perjury. I did my best to avoid examining witnesses intentionally as I know that I should not be able to rely on the statements of either party's supporters." But it should be obvious to any judicial officer that proceedings in Court are not to be determined on such *a priori* grounds and

*Criminal Revision No. 59 of 1917, against the order of J. A. Ross Esq. Sub-divisional Magistrate of Naralingun, dated the 9th November, 1916.

preconceived notions. The cardinal principle is that in such proceedings both parties must be given an opportunity of adducing such evidence as they are advised to give. It follows that the order complained of must be set aside.

We therefore make this Rule absolute. But we may remark that it will of course be open to the district authorities to take such further action in the interest of the maintenance of the peace as to them may seem necessary.

S. C. R. C.

Rule made absolute.

Before Mr. Justice Teunon and Mr. Justice Richardson.

LALIT MOHAN CHAKRAVARTY AND OTHERS

v.

HARENDRA KUMAR DE AND OTHERS.*

*Eastern Bengal and Assam Disorderly Houses Act (II of 1907, E. B. and A)
Sec. 3, proceedings under—Order passed by the enquiring Magistrate, if can
be modified by the District Magistrate.*

A District Magistrate has no jurisdiction to interfere with an order passed by a criminal Court in the exercise of its jurisdiction under section 3 of the Eastern Bengal and Assam Disorderly Houses Act.

Rajasi Khemtawalli v. The King-Emperor (1) referred to.

Criminal Revision.

Upon a complaint having been made by the present petitioners, Lalit Mohan Chakravarty and others, proceedings under section 3 of the Eastern Bengal and Assam Disorderly Houses Act, were taken against the opposite party Harendra Kumar De and others, the owners of certain houses in the city of Dacca. The enquiring Magistrate held that the houses were used, as described in section 2 cl. (b) of the Act, to the annoyance of the peaceful residents of the locality, and he directed the owners and occupiers of those houses to discontinue such use within 15 days from the date of his

*Criminal Revision No. 515 of 1917, against the order of F. W. Robertson Esq., Additional District Magistrate of Dacca, dated the 20th March, 1917, modifying that of S. C. Sinha, Esq., Sadar Sub-Divisional Magistrate of Dacca dated the 18th February 1917.

(1) (1910) 14 C. W. N. 404.

CRIMINAL.

1917.

Sakhayet Ali

Alhadi Hazi.

Teunon, J.

CRIMINAL.

1917.

June, 6.

CRIMINAL.

1917.

Lalit

v.

Harendra.

order. The opposite party moved the Additional District Magistrate of Dacca, and the latter passed an order by which he practically stayed the order of the enquiring Magistrate for a period of 6 months, and also modified it in certain other particulars.

Against that order the complainants moved the High Court and obtained the Rule.

Babu Hemendra Kumar Das for the Petitioners.

Mr. J. N. Roy and *Babu Kshitish Chandra Neogy* for the Opposite Party.

The following judgments were delivered :

June, 6.

Teunon J—In this case it appears that on a complaint made in accordance with the provisions of section 5 (c) of the Eastern Bengal and Assam Disorderly Houses Act, 1907 proceedings or prosecutions under section 3 were taken against the owners and occupiers of houses Nos. 7, 25 and 26 of a certain lane in the city of Dacca. On the enquiry held in accordance with the provisions of section 3 of the aforesaid Act the enquiring Magistrate found that as a matter of fact the houses in question were used as brothels, as disorderly houses, and for the purpose of habitual prostitution to the annoyance of the inhabitants of the vicinity, that is to say, in contravention of the provisions of section 2 (b) of the same Act. He thereupon directed that such use of the houses in question should be discontinued within 15 days from the date of the order. The persons affected by the order moved the Additional District Magistrate of Dacca and obtained from him an order by which he practically stayed the order of the enquiring Magistrate for a period of six months and also modified it in certain other particulars.

The question involved in this Rule is whether the District Magistrate had jurisdiction or was competent to modify the order of the enquiring Magistrate in the manner in which he has done, or in any manner whatsoever. Neither in the Act itself, nor in the Criminal Procedure Code, nor in any law that has been brought to our notice do we find any provision which justifies the District Magistrate in interfering with an order passed by a criminal Court in the exercise of its jurisdiction under section 3 of the Act to which we have made reference. It is also clear that if orders made under section 3 are modified by other Magistrates difficulties would arise in applying the provisions of section 6 of the Act. We are therefore clearly of opinion that the Magistrate's action was wholly without jurisdiction, and in so far as it is an order modifying the trying

Magistrate's order and not an order directed to police officers we direct that it be set aside.

Richardson, J.—I have only one word to add with reference to the case of *Rajani Khemtawalli v. The King-Emperor* (1), which was cited in the course of the argument. Whatever opinion may have been expressed in the judgment delivered in that case, I do not understand that any point was actually decided by the learned Judges inconsistent with our decision in the present case.

A. N. R. C.

Order set aside.

) (1910) 14 C. W. N. 404.

CRIMINAL,

1917.

Lalit

v.
Harcudra.

Teunon, J.

APPELLATE CRIMINAL.

Before Mr. Justice Teunon and Mr. Justice Richardson.

AKHOY KUMAR MUKERJEE *alias*

BHUTNATH MUKERJEE

v.

KING EMPEROR *

CRIMINAL,

1917.

September, 25,
October, 9.

Evidence, admissibility of—Witnesses—Co-accused, competency of—Complicity in same matter—Joint trial—Separate trial—Indian Oaths Act (X of 1873), section 5—Criminal Procedure Code (Act V of 1898) section 342, Cl. (4).

Although the Evidence Act is silent as to competency of accused persons as witnesses yet in view of the provisions of section 5 of the Indian Oaths Act and section 342 Cl. (4) of the Criminal Procedure Code an accused person actually under trial cannot be sworn as a witness, and that if two or more persons are being *jointly* tried none of them is a competent witness for or against the others. But if two persons accused of complicity in the same matter are tried *separately* each is a competent witness at the trial of the other.

Appeal by the Accused.

Conviction under section 411 or section 414 in the alternative, of the Indian Penal Code.

The material facts and arguments will appear sufficiently from the judgment.

Babu Manmatha Nath Mukerjee for the Appellant.

Mr. Orr for the Crown.

C. A. V.

* Criminal Appeal No. 479 of 1917 against the sentence of Mr. Abbas Salam, Third Presidency Magistrate, Calcutta, dated the 27th July, 1917.

CRIMINAL.

1917.

Akhoy

v.
King-Emperor.

October, 9.

The judgment of the Court was as follows :

The appellant, Akoy Kumar Mukerjee alias Bhut Nath Mukerjee, has been convicted by the Third Presidency Magistrate Mr. Abbas Salam, in the alternative under section 411 or section 414 of the Penal Code and sentenced to rigorous imprisonment for one year.

The case relates to two currency notes of Rs. 1,000 each which were undoubtedly stolen on the 22nd January, 1917, and subsequently on the 26th January presented for encashment at the Paper Currency Office, by Sheo Pershad Chatterjee, a clerk of that Office. Sheo Pershad's arrest led to the arrest of the appellant. The police placed the two men for trial before Mr. Keays, the Second Presidency Magistrate. Mr. Keays as he was at liberty to do, directed that they should be tried separately. Sheo Pershad's case was taken first and at his trial, the appellant was put in the witness box and gave evidence. In the result Sheo Pershad was convicted but the conviction was subsequently set aside by this Court. Now the appellant has been tried and his deposition in Sheo Pershad's case has been used as evidence against himself. His learned pleader Mr. Manmatha Nath Mookerjee has urged on his behalf that the deposition is inadmissible mainly on the ground that the appellant was not a competent witness for or against Sheo Pershad.

The general rule on the subject of the competency of witnesses is contained in section 118 of the Evidence Act.

"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

The Evidence Act is silent as to accused persons, but section 5 of the Indian Oaths Act (Act X of 1873) provides that "Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person," and clause (4) of section 342 of the Criminal Procedure Code similarly provides that "No oath shall be administered to the accused." It is undisputed, therefore, that an accused person actually under trial cannot be sworn as a witness, and that if two or more persons are being jointly tried none of them is a competent witness for or against the others. But in our opinion this exception to the general rule goes no further, and has no application to an accused person who is not at the time under trial. Accordingly when two persons though they may be accused of complicity in the same offence,

are tried separately each is a competent witness at the trial of the other.

We are disposed to regard the law as settled in this sense and it is only in deference to the arguments addressed to us that we go further into the matter.

It is hardly contested that the provision in the Criminal Procedure Code, regard being had to its context, applies only to the accused actually under trial, and it appears to us that the language of the Oaths Act is capable of and should receive a like interpretation. The accused person in a criminal proceeding is the accused who is the subject of that particular proceeding.

This view is in accord with English practice. [Stephen's Digest of the Law of Evidence, Articles 108, Archbold's Criminal Pleading, Evidence and Practice, 23rd Edition, page 394 (note)]. In India the law was laid down as we have stated it so long ago as the year 1868 by Couch C. J. and Newton J. in *Reg v. Narayan* (1). It is true that the Oath's Act had not then been passed but section 204 of the first Criminal Procedure Code (Act XXV of 1871) was to the same effect as the corresponding provision in the present Code to which we have referred. It may be that some difficulty has since been caused in this connection by certain decisions relating to illegal or irregular pardons. The earlier cases are referred to and distinguished or explained in *Queen-Empress v. Mona Puna*, (2). In these and other cases the true question appears to be whether, several persons having been placed on their trial together, the proceedings as against one of them have come to an end so as to remove the impediment to his being examined as a witness for or against the others: See *Subrahmania Ayyar's* case (3) per Arnold White C. J. and *Hussein Haji's* case (4). On this question as it has arisen in particular cases or in particular circumstances, there may have been some conflict of opinion and the decisions may not be entirely reconcilable. Possibly too, traces may be found of some confusion between the competency of a person as a witness and the admissibility of any evidence such person may have to give. However that may be, in the case before us the appellant and Sheo Pershad were never on their trial together. Sheo Pershad was tried separately. In such a case the rule applicable is that laid down in *Narayan's* case (1) already cited and again in

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(1) (1868) 5 Bom. H. C. R. (C. C.) 1.

(2) (1892) I. L. R. 16 Bom. 661.

(3) (1901) I. L. R. 25 Mad. 61 (67) et seq.

(4) (1900) I. L. R. 25 Bom. 422.

CRIMINAL.

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Durant's case (1). The latter case, which was decided by Candy J. upon the present Code is clearly in point. Full reasons for the decision, with which we generally concur, will be found in the judgment of the learned Judge, and if the decision was not actually approved and adopted by this Court in *Banu Singh's* case (2), it was certainly not dissented from. In fact at page 1357 of the report, the learned Judges (Mitra and Holmwood JJ.) say this :—

"The law, however, is well settled that an accomplice, if he is not an accused under trial in the same case, is a competent witness, and may, as any other witness, be examined on oath."

That expression of opinion even if it be nothing more, certainly supports our conclusion that that the appellant was a competent witness at the trial of Sheo Pershad, a conclusion which is also supported by the observations of another bench of this Court, in *Amrita Lal Harra's* case (3).

We may mention that, as the cases show, it may often be to the advantage of the accused actually under trial that a person alleged to be an accomplice should be put into the witness box.

It was next argued that if the appellant was a competent witness at Sheo Pershad's trial, the evidence he gave was not admissible against himself at his own trial. It was not suggested that the appellant had brought himself within the protection afforded to witnesses by the proviso to section 132 of the Evidence Act. His evidence was voluntarily given. Reference was however, made to certain observations in *Nanda Gopal's* case (4). There were special facts in that case. Nanda Gopal and others were placed on their trial before a Presidency Magistrate. Nanda Gopal was discharged. The other accused were convicted and appealed to this Court. This Court before disposing of the appeal directed that Nanda Gopal should be examined as a witness. No question was raised as to his competency and his evidence was duly taken by the Magistrate and sent up to this Court. Then the appeal of the other accused was dismissed and the learned Judges at the same time issued a Rule upon Nanda Gopal to show cause why the case against him should not be further inquired into. The Rule was heard by the Chief Justice and Walmsley J. and in discharging the Rule the learned Chief Justice incidentally said, that "the evidence of Mr. N. G. Roy given under the direction of the Court could not be used against him if he

(1) (1898) I. L. R. 23 Bom. 213.

(2) (1906) I. L. R. 33 Calc. 1353.

(3) (1915) I. L. R. 42 Calc. 957 (986) ; 21 C. L. J. 331.

(4) (1916) 20 C. W. N. 1128 (1132).

were to be retried." But the point was not decided and could not be decided at that stage. The Rule was discharged because it was considered unfair that the proceedings against Nanda Gopal should be revived upon the strength of statements made by him in the witness box, in the course of an examination directed by this Court. The ground taken was quite independent of the further question whether those statements would or would not have been admissible against him supposing he were retried. Section 132 of the Evidence Act was not referred to and, apart from that, the case is distinguishable from the present upon the facts. The case of an accused person who is discharged and then gives evidence and against whom an order for further inquiry is then made, may be subject to considerations which are not applicable to the present case. Upon that question we need express no opinion. In the present case, we are unable to say that the Magistrate committed any error of law by admitting the appellant's deposition at Sheo Pershad's trial as evidence against him at his own trial.

It was lastly argued that the Magistrate could not properly find on the materials before him that the appellant "knew or had reason to believe" that the notes were stolen property. Reference was made to *Empress v. Rango Timaji* (1). No doubt mere carelessness or suspicion might not amount to criminal knowledge though the question might be one of degree. But in the present case the accused admits a dishonest mind. He says: I did not know that the notes were stolen. I thought they were forged. There is nothing in the notes themselves to suggest that they were forged. We are of opinion that the evidence, including the statements of the appellant himself and the letter which he placed in his sister's custody afford ample warrant for the finding that he knew or in fact believed that the notes had been stolen.

For the reasons given this appeal must be dismissed. The appellant if on trial must surrender and undergo the remainder of his sentence.

D. K. R.

Appeal dismissed; conviction upheld.

(1) (1880) L. I. R. 6 Bom. 402

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Akhoy

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CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Cuming

CIVIL.

1916.

July, 7, 10.

KSHETRANATH BANERJEE

v.

KALIDASI DAS.*

Suit, forum of—Suit for recovery of specific sum of money—Suit for accounts—Provincial Small Cause Courts Act (IX of 1887), Sch. II. Art. 31—Litigant, if can take inconsistent positions in Court—Civil Procedure Code (Act V of 1908), O. 46, Rr. 6, 7.

A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. There cannot, in essence, be a suit for accounts by the plaintiff against the defendant unless the defendant is under a liability to render accounts to the plaintiff.

Chidri v. Siddam (1); *Varadrajulu v. Pattra* (2) and *Krishnaswami v. Poovanna* (3) referred to †

The plaintiff asserted that he was entitled to get Rs. 418 for salary, Rs. 367 as money borrowed for the benefit of the defendant and Rs. 76 as house rent that is, Rs. 861 in the aggregate. He then allowed credit for Rs. 425 and claimed to recover Rs. 466. The plaint added that if the correctness of the amounts was questioned, the amount due might be determined on examination of the accounts:

Held, that the suit was not a suit for accounts under Art. 31, Sch. II of the Provincial Small Cause Courts Act and was cognizable by a Court of Small Causes.

A plaint was returned to the Court of Small Causes on the objection of the defendant:

Held, that no objection to the jurisdiction of the Small Causes Court to hear the suit could be taken by the defendant, as no litigant could be allowed to take up inconsistent positions in Court.

Where a civil Court returned the plaint on the ground that the suit was triable by a Court of Small Causes and if the Judge of the Small Causes Court was of a different opinion, he might reasonably have entertained a doubt as to the *forum* where the suit should be instituted and thus refer the matter to the

* Civil Rule No. 700 of 1916, against the orders of Babu Mati Lal Ray, Munsiff of Jessore, dated the 23rd December, 1914, and 2nd June, 1915, and of Babu Sarat Kishore Basak, Small Cause Court Judge of Jessore, dated the 23rd April, 1915.

(1) (1912) 11 M. L. T. 13; (1912) Mad. W. N. 36.

(2) (1913) 24 M. L. J. 693; 14 M. L. T. 46; (1913) Mad. W. N. 879.

(3) (1915) 28 I. C. 955.

† See also *Mariappa v. Arunachalam* (1915) 3 Mad. L. W. 143—Rep.

High Court for decision. On the other hand, if he (the Small Cause Court Judge) was so confident of the correctness of his view as to entertain no doubt whatever in the matter within the meaning of rule 6 (1) of order 46 of the Code of Civil Procedure, he might, at any rate, send the record to the District Judge with a request that action might be taken by him under rule 7.

Application for revision by the Plaintiff.

Suit to recover from the defendant certain sum of money.

The material facts and arguments appear from the judgment.

Babu Hirendra Nath Ganguly for the Petitioner.

None for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—We are invited in this Rule to determine the forum where the plaintiff can obtain relief in respect of his claim. The plaintiff sues to recover from the defendant a sum of Rs. 466. He asserts that he was entitled to get Rs. 448 for salary, Rs. 367 as money borrowed for the benefit of the defendant, and; Rs. 76 as house-rent, that is, Rs. 891 in the aggregate; he then allows credit for Rs. 425 and claims to recover Rs. 466. The plaint adds that if the correctness of the amounts is questioned the amount due may be determined on examination of the accounts. The suit thus framed was instituted in the Court of the Munsiff of Jessore on the 11th December 1913. Summons was served upon the defendant in due course. She entered appearance and pleaded that the suit was cognizable by the Court of Small Causes and was consequently not triable by the Munsiff under section 16 of the Provincial Small Cause Courts Act. An issue was thereupon raised, whether the suit was cognizable by a Court of Small Causes. The Munsiff came to the conclusion that the suit was so cognizable, and, on the 23rd December, 1914, returned the plaint to the plaintiff for presentation to the proper Court. The plaint so returned was presented in the Court of Small Causes at Jessore on that very day. Summons was again served upon the defendant, who appeared and filed a written statement on the 12th April, 1915. As that written statement is not before us, we do not know whether objection was taken by the defendant to the jurisdiction of the Small Cause Court to entertain the suit. It is plain that on the principle that no litigant is permitted to take up inconsistent positions in Court, such objection could not have been taken by her, for at her instance the Munsiff had held that the Small Cause Court—and that Court alone—had jurisdiction to entertain the suit. We find, however, the following order recorded by the Small Cause Court Judge, on the 23rd April,

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Mookerjee, J.

1915: "This Court has no jurisdiction. Return for presentation to the proper Court." The Small Cause Court Judge does not assign, it will be observed, any reasons in support of his conclusion; he makes no endeavour to meet the grounds assigned by the Munsiff in support of his order. The plaintiff took the plaint again to the Court of the Munsiff, and filed it on the same day. On the 2nd June, 1915, the Munsiff held, and, in our opinion, very properly held, that so long as his previous order stood, he could not entertain the suit. Accordingly he returned the plaint to the plaintiff a second time for presentation to the proper Court. The plaintiff thereupon applied to this Court and obtained the Rule now under consideration; his prayer is that either the Munsiff or the Small Cause Court Judge be directed to entertain and try his suit which was instituted more than two and a half years ago.

Before we determine the question of the forum of the suit, we cannot but observe that the Subordinate Judge should never have followed the procedure he adopted to the manifest harassment of the plaintiff. He should have taken action under rule 6 or rule 7 of order 46 of the Code. Rule 6 provides that where, at any time before judgment, a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit. The Munsiff had held, in a carefully written judgment, that the suit was cognizable, not by his Court but by the Court of Small Causes. If the Judge of the Court of Small Causes, was of a different opinion he might reasonably have entertained a doubt as to the forum where the suit should be instituted and thus referred the matter to this Court for decision. On the other hand, if the Small Causes Court Judge was so confident of the correctness of his view as to entertain no doubt whatsoever in the matter within the meaning of rule 6 (1) he might, at any rate, have sent the record to the District Judge with a request that action might be taken by him under rule 7. The lamentable result of the course adopted by the Small Cause Court Judge has been that the plaintiff has been driven from Court to Court and has not been able yet to obtain trial of his suit on the merits; while his summary order leaves us even now entirely in the dark as to the grounds for his view of the scope and nature of the suit.

As regards the nature of the suit, we are clearly of opinion that the view taken by the Munsiff is correct. The suit as already stated is for recovery of money and is *prima facie*, cognizable by a Court of Small Causes. Reliance however appears to have been

placed before the Munsiff on clause 31, of the second schedule to the Provincial Small Cause Courts Act which excludes from the jurisdiction of Small Cause Courts a suit for accounts. In our opinion the present suit cannot be properly described as a suit for accounts. A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. This has been pointed out in a long series of decisions, amongst others in *Hans Raj v. Ratni* (1); *Konduru v. Subbiah* (2); *Sankara v. Errama* (3); *Kailash v. Kiranenda* (4); *Maroti v. Balaji* (5); *Kadar v. Venkata* (6); *Indar Mal v. Baldeo* (7); *Malaya v. Venganan* (8). There cannot in essence be a suit for accounts by the plaintiff against the defendant unless the defendant is under a liability to render accounts to the plaintiff. This was recognised in the cases of *Chidri v. Siddam Setti* (9); *Varadarajulu v. Pattra* (10); *Krishnaswami v. Poovanna* (11). In the present case, there is no allegation that the defendant is under a liability to the plaintiff to render accounts in the well-known technical sense of the term. We are accordingly of opinion that this is not a suit for accounts and is cognizable by a Court of Small Causes.

The result is that this Rule is made absolute; the order of the Small Cause Court Judge, dated the 23rd April, 1915, is set aside and the case is remitted to him in order that he may take cognizance of it and try it on the merits. The plaint which has been filed in this Court will be received here and transmitted to the Small Cause Court Judge. As the application has not been contested by the defendant, there will be no order for costs.

A. T. M.

Rule made absolute.

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| (1) (1904) I. L. R. 27 All. 200. | (2) (1904) I. L. R. 28 Mad. 394. |
| (3) (1908) 19 Mad. L. J. 113. | (4) (1911) 10 I. C. 883. |
| (5) (1912) 8 N. L. R. 36. | (6) (1912) 14 I. C. 573. |
| (7) (1914) 12 A. L. J. 230. | (8) (1915) 1 Mad. L. W. 180. |
| (9) (1912) 11 M. L. T. 13; (1912) Mad. W. N. 36. | |
| (10) (1913) 24 M. L. J. 693; 14 M. L. T. 46; (1913) Mad. W. N. 879. | |
| (11) (1915) 28 I. C. 955. | |

CIVIL.

1916.

Kshetranath

Kalidasi Dasi.

Mookerjee, J.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

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August, 21.

NILMANI DEY

v.

HIRALAL DAS.*

Rateable distribution—Civil Procedure Code (Act V of 1908), Sec. 73—Decrees against estate of deceased testator—Decrees obtained against two out of three executors.

Two decrees were obtained against the estate of a deceased testator, each obtained against two out of three executors. One of these two executors was common to the two suits. Each decree was *prima facie* capable of execution against the estate :

Held, that the decree-holders were entitled to rateable distribution of the assets under section 73 of the Code of Civil Procedure.

Application for revision.

Application for rateable distribution.

The material facts and arguments appear from the judgment

Babu Nani Lal Dey for the Petitioners.

Babu Probodh Chandra Roy for the Opposite Party.

The judgment of the Court was delivered by

August, 21.

Mookerjee, J.—The events which led to the issue of this Rule may be briefly stated. One Bhushan Chunder Bhar appointed three persons A, B and C as executors to his will. After his death, one of his creditors X instituted a suit against two of these executors, A and B, for recovery of his dues from the estate. The suit was not defended and an *ex parte* decree was made on the 17th April 1917. A, one of the executors, who was himself a creditor of the estate, instituted a suit against B and C for recovery of his dues. The claim was decreed. The question now arises, whether these two decree-holders are entitled to rateable distribution of the assets under section 73 of the Civil Procedure Code. The Subordinate Judge has held that X is not entitled to claim rateable distribution along with A. In our opinion this view cannot be supported.

It may be conceded that order 31, rule 2, Code of Civil Procedure provides that where there are several executors, they shall all be made

* Civil Rule No. 577 of 1917, against an order of Babu Lalit Mohun Das, Subordinate Judge of Hooghly, dated the 11th July, 1917.

parties to a suit against one or more of them, provided that the executors who have not proved their testator's will need not be made parties. From this point of view, it is conceivable that the petitioner should have instituted this suit against A, B and C. No objection however was taken to the frame of the suit, and it is now impossible to hold in these proceedings that the decree made therein is not operative against the estate of the testator, merely because one of the executors was not joined as a party. The view, we take, receives some support from the decision in *Hafizu Bai v. Kasi Abdul Karim* (1). What has happened in substance is that there are now two decrees against the estate, each obtained against two out of three executors. One of these two executors is common to the two suits. Each decree is *prima facie* capable of execution against the estate of the deceased testator. In these circumstances, we are of opinion that the two decrees may, without unduly straining the language of section 73, be regarded as passed against the same judgment-debtor, namely, they are both decrees against the estate of Bhuskan Chunder Bhar, in one case, represented by A and B, in the other case by B and C. We may add that we are not disposed to put a narrow construction upon the terms of section 73, so as to defeat the ends of justice. We hold accordingly that the two decree-holders must rateably divide the assets under section 73. The Rule is made absolute and the order of the Court below set aside. The record will be returned to the Subordinate Judge in order that this order may be carried out. We make no order as to the costs of this Rule.

A. T. M.

Rule made absolute.

(1) (1893) I. L. R. 19 Bom. 83.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Walmsley.*

RAI BAIKANTHA NATH SEN BAHADUR

v.

RAMAPATI CHATTERJEE.*

*Rent suit—Co-sharer landlord—Plaint—Bengal Tenancy Act (VIII of 1885),
Sec. 148 A—Decree, nature of.*

* Civil Rules Nos. 305 and 306 of 1917, against a decision of Babu Biroja Charan Mitra, Subordinate Judge of Burdwan, dated the 19th December, 1916, confirming that of Babu Haripada Banerjee, Munsif of Katwa, dated the 18th December, 1915.

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Nilmani

v.

Hiralal.

Mookerjee, J.

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Co-sharer landlords, who, by arrangement with the tenants, collect their shares separately, and have in previous years brought separate suits for recovery of their dues, are competent to sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co-sharers together, without the consent of the tenants. But if a plaintiff seeks to avail himself of the special provisions of section 148 A of the Bengal Tenancy Act, he must in his plaint seek to recover the entire amount due to himself and his co-sharers.

The nature of a decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plaintiff separately by reason of the fact that he has on previous occasions collected that share of the rent separately from his co-sharers, the decree will be a money decree; if, on the other hand, it is a decree in a suit properly framed under section 148 A, the decree will operate as a rent decree, capable of execution under the special procedure prescribed by the Bengal Tenancy Act.

Where the plaintiff throughout the plaint proceeded on the allegation that he had previously collected his share of the rent separately, and, in the first prayer clause, actually sought to recover that share, and in a second alternative clause stated that if it was found that the tenant had not paid the rent due to his co-sharer, he might be granted leave to amend the plaint so as to secure a decree for the entire sum:

Held, that this was not a plaint in a rent suit of the character contemplated by section 148 A of the Bengal Tenancy Act.

Application for revision by the Defendant.

Suit for rent.

The material facts and arguments appear from the judgment.

Babu Hemendra Nath Sen for the Petitioner.

Babu Karunamoy Bose for the Opposite Party.

The judgment of the Court was delivered by

August, 29.

Mookerjee, J—The question for determination in this Rule is, whether the suit as framed is maintainable under section 148 A of the Bengal Tenancy Act. The plaintiff alleged, in the first paragraph of the plaint, that he had separately collected his share of the rent from the tenant defendant in previous years. In the second paragraph he stated that he had demanded his separate share of the rent from the tenant but to no avail. He added, in the third paragraph, that he was not aware whether his co-sharers (whom he joined as defendants) had separately realised their shares of the rent. In the first clause of the fourth paragraph he prayed that a decree might be made in his favour for his share of the rent; then followed a second alternative clause to the effect that if it was found that the tenant had not paid the rent due to his co-sharers, he might be granted leave to amend the plaint so as to secure a decree for the

entire sum. We are of opinion that this is not a plaint in a rent suit of the character contemplated by section 148 A.

Reference has been made to the decisions in *Pergash Lal v. Akhowri Balgobind Sahoy* (1) and *Nanda Lal Chowdhuri v. Kala Chand Chowdhuri* (2), which, however, do not support the contention of the plaintiff. In each of these cases the plaintiff landlord instituted the suit on the allegation that rent was recoverable by him jointly with his co-sharers and that he was obliged to institute a suit alone inasmuch as his co-sharers had not joined and had not disclosed how much, if any sum, was due on account of their shares.

In the case before us, the plaintiff throughout the plaint proceeds on the allegation that he has previously collected his share of the rent separately and in the first prayer clause, actually seeks to recover that share. No doubt as pointed out by the Judicial Committee in the case of *Pramada Nath v. Ramani Kanta* (3), and subsequently by this Court in the case of *Bhola Nath Bose v. Belchambers* (4), co-sharer landlords, who, by arrangement with the tenants collect their shares separately and have in previous years brought separate suits for recovery of their dues, are competent to sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co-sharers together without the consent of the tenants. But it is plain that if a plaintiff seeks to avail himself of the special provisions of section 148 A, he must in his plaint seek to recover the entire amount due to himself and his co-sharers; this the present plaintiff has failed to do. The Courts below have concurrently found that the plaintiff never collected his share of the rent separately and that the evidence he has adduced in support of the allegation made in the plaint is untrustworthy. In our opinion, the suit as framed is not a suit under section 148 A and should not have been entertained. We cannot accept the contention that there is no substance in this objection. The nature of the decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plaintiff separately by reason of the fact that he has on previous occasions collected that share of the rent separately from his co-sharers, the decree will be a money decree; if, on the other hand, it is a decree in a suit properly framed under section 148 A, the decree will operate as a rent decree, capable of execution under the special procedure prescribed by the Bengal Tenancy Act.

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Mookerjee, J.

(1) (1890) I. L. R. 19 Calc. 735.

(2) (1910) 15 C. W. N. 820.

(3) (1907) I. L. R. 35 Calc. 331; 7 C. L. J. 139.

(4) (1911) 14 C. L. J. 373.

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1917.

Balkantha
v.

Ramapati.

Mookerjee, J.

We are accordingly of opinion that this Rule must be made absolute and the suit dismissed with costs, inasmuch as the allegation of separate collection has not been established. We assess the hearing fee in this Court at one gold mohur.

A similar order will be drawn up in Rule 306 of 1917.

A. T. M.

Rules made absolute.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Beachcroft.*

CIVIL.

1917.

July, 24.

MOHENDRA NATH DAS AND ANOTHER

v.

MOHILAL KOLAY AND OTHERS.*

Award—Private reference to arbitration—Costs, award of—Written notice.

An absence of written notice to one of the defendants does not necessarily invalidate an arbitration proceeding

Where an order for costs was made in an award made on private references to arbitration, which could be expunged and the remainder of the award would thereby remain unaffected :

Held, that the award could be enforced to that extent.

Quære : Whether the principle, that when a suit has been referred to arbitrators, they have authority to deal with the costs of reference and the award, can be extended to private references to arbitration.

Application for revision by the Plaintiffs.

The material facts and arguments appear from the judgment.

Babu Satis Chandra Mukherjee for the Petitioner.

Babu Haradhan Chatterjee for the Opposite Party.

The judgment of the Court was delivered by

July, 24.

Mookerjee, J.—We are invited in this Rule to set aside an order of dismissal of an application to enforce a private award. There were differences between the plaintiffs and the defendants regarding the boundary between their respective homesteads. On the 17th November, 1914, they appointed five persons as arbitrators to settle the dispute. The arbitrators made their award on the 6th July, 1915. By their

* Civil Rule No. 356 of 1917, against a decision of Babu Lalit Mohun Das, Subordinate Judge of Hooghly, dated the 22nd January, 1917, confirming that of Babu Satya Charan Mookerjee, Munsif of Amta, dated the 11th July, 1916.

award they fixed the boundary line between the homesteads and directed the defendants to pay to the plaintiffs Rs. 6-2 as. as one-half share of the remuneration and travelling expenses of one of the arbitrators, which had been paid in full by the plaintiffs. The plaintiffs thereupon applied under paragraph 20 of the second schedule to the Civil Procedure Code, 1908, to enforce the award. The Court of first instance dismissed the application on the ground that the arbitrators acted in excess of their authority when they directed the defendants to pay to the plaintiffs the sum mentioned in the award. Upon appeal the Subordinate Judge has taken the same view. He has further held that the award is open to objection also on the ground that the arbitrators did not give written notice of their meetings to the second defendant. In our opinion, the order of the Subordinate Judge cannot be sustained.

It is plain that the absence of written notice to one of the defendants does not necessarily invalidate the proceedings. We are not prepared to accept the contention that under the terms of the agreement of reference the parties were entitled to written notice. The agreement states that the arbitrators would be entitled to proceed *ex parte* if any of the parties did not enter appearance notwithstanding the service of written notice. This provision, however, is not equivalent to a condition that if the arbitrators proceed with the arbitration and all the parties had knowledge of these proceedings, still the award would be invalidated merely because one of the parties did not receive a written notice. The Subordinate Judge has found that the second defendant had verbal notice of the proceedings and yet did not enter appearance. In such circumstances, we cannot hold that the defendants may challenge the validity of the award on the ground that a written notice was not served on him: *Oswald v. Earl Grey* (1). In our opinion, he is as much bound by the award as if a written notice had been served upon him.

The question next arises, whether the award is invalid because the arbitrators made an order for payment of costs. It is not necessary for our present purpose to determine whether they did or did not act in excess of their authority, when they made an order for costs. It has been held in the case of *Mohanlal v. Nathuram* (2), that when a suit has been referred to arbitrators, they have authority to deal with the costs of the reference and the award. We need not enquire whether this principle can reasonably be extended to private references to arbitration. But even if it be

(1) (1855) 24 L. J. Q. B. 69.

(2) (1868) 1 B. L. R. 144 O. C., 1 B. L. R. 144 O. C.

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assumed that the order for costs was made without jurisdiction, it is plain that this does not invalidate the whole award. The decision in *Sabitri Debi v. Promoda Prosad Chatterjee* (1), does not really assist the contention of the opposite party. That case no doubt shows that under para 21 of the second schedule to the Civil Procedure Code of 1908, the Court is competent to direct a private award to be filed if the grounds mentioned in paras 14 and 15 are not established; if such grounds are established, the Court is bound to refuse to file the award. Now para 14 (a) provides that an objection may successfully be taken to the validity of an award where the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred. Consequently, where a matter has been left undetermined though referred to arbitration, or a matter has been determined though not referred to arbitration, and such matter can be separated without affecting the determination of the matters referred, objection to the whole award cannot be sustained. The present case is precisely of that description. Even if the order for costs be expunged, the remainder of the award remains unaffected, and the petitioner is content to have the award enforced to that extent. It follows accordingly that neither of the grounds on which the award has been rejected by the Subordinate Judge can be sustained.

The result is that this Rule is made absolute and the order of the Court below set aside. The award will be filed and a decree drawn up in accordance therewith, except in so far as the award directs the defendants to pay Rs. 6-2 as. to the plaintiffs. The plaintiffs are entitled to their costs in all the Courts. We assess the hearing fee in this Court at two gold mohurs.

A. T. M.

Rule made absolute.

(1) (1913) 21 C. L. J. 248.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Walmsley.

BOGHA MOWER AND OTHERS

v.

RAM LAKHAN MISSER AND OTHERS.*

Admissibility in evidence—Document varying rent—Bengal Tenancy Act (VIII of 1885), Sec. 103B, Sub-sec. (3)—Mode of proof.

A document which embodies a contract for variation of rent payable in respect of a lease, is in essence a lease, and is compulsorily registrable. If it is not registered in accordance with law, it is not only not admissible in evidence, it does not even constitute a valid and operative contract between the parties.

If it is established that the only evidence whereon the entry under sub-section (3) of section 103 B of the Bengal Tenancy Act, was made by the Settlement Officer, does not support his conclusion, that is the strongest possible proof that the entry is incorrect. The party is not limited to a particular mode of proof; he can prove *alimunde* that the entry is in fact, incorrect. He can prove that the material whereon the Settlement Officer based his decision, does not in law justify his conclusion as to the relative rights and obligations of the parties.

Appeal by the Defendants.

* Suit for rent.

The Court of first instance decreed the claim in full. That decree was modified by the first appellate Court, which, again, was set aside by the following judgment of

Roe, J.—This appeal is directed against a decision of the Subordinate Judge of Shahabad modifying a decision of the munsiff of Arrah. The plaintiffs as landlords brought this suit for rent for certain *Bhowli* lands and *Nagdi* lands against the defendants. The defendants pleaded that they had no *Bhowli* lands, that the *Nagdi* rents sued for was not the real rent and that they had paid Rs. 172 to the landlord. Upon the claim to rent for *Bhowli* lands, the learned Subordinate Judge agreed with the Munsiff in holding that the plaintiff's case had been proved and as regards the payment of Rs. 172, both Courts have held that it was proved. Upon this question of fact there is no further contest. The only point in issue before this Court is whether the *Nagdi* rent claimed by the plaintiff was in fact sufficiently proved. The learned Munsiff made a decree

* Letters Patent Appeal No. 16. of 1916, against the decision of Mr. Justice Roe, dated the 16th December, 1915, in Appeal from Appellate Decree No. 3429 of 1912, against the decree of Babu Pares Chandra Banerjee, Subordinate Judge of Shahabad, dated the 24th July, 1912, modifying that of Syed Mahammad Tarif, Officiating Munsiff, 3rd Court, Shahabad, dated the 5th July, 1911.

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at the rates claimed by the plaintiffs. The learned Subordinate Judge in modification of his decision has given a decree at the rates admitted by the defendants. The rents claimed by the plaintiffs was that recorded in the finally published record of rights. On a consideration of the issues of law and fact involved in this case, the learned Subordinate Judge writes "some reliance has been placed in this case on behalf of the plaintiff on the Survey Khatian (Ex. 7) but the document (Ex. B) shows that the entry in the *khatian* is based not on the plaintiff's papers but only on the *solenama* above referred to. The *khatian* cannot therefore help the plaintiffs. I hold that the *solenama* is inadmissible as it has not been registered: The *jama* stated by the defendants may not be correct, but in this case the plaintiffs can get a decree only at the rate admitted by them there being no other proof of the rental." The circumstances in which the *solenama* was held by the Subordinate Judge to be inadmissible is that it was a document settling the rental of 35 bighas of land at an annual rent of Rs. 139-2-0 and that it was filed in a suit in which the only issue was what was the rent due upon 17 bighas of land. Cognizance of this agreement was not taken by the Court which tried the suit, the only decree in the suit being that the suit for rent was dismissed. The agreement was not registered. I agree with the learned Subordinate Judge that the *solenama* was not in fact admissible in evidence. But the record-of-rights must be presumed to be correct until it is proved by evidence to be incorrect. The learned Subordinate Judge has not found that it has been proved to be incorrect. He has found only that it was prepared on the basis of a finding, dependent upon inadmissible evidence. The evidence of the method by which the settlement officer arrived at his conclusions is not the evidence contemplated in section 103B of the Bengal Tenancy Act. The evidence contemplated in that section is evidence amounting to proof of the incorrectness of the record itself. The learned Subordinate Judge has specifically stated that the *jama* stated by the defendants may not be correct. There was in fact no direct evidence that the record-of-rights was incorrect. The suit should have been decreed on the basis of the entries contained in that record.

This appeal is therefore allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. The costs of this appeal and in the lower appellate Court will be paid by the respondent.

Against this decision, the defendants preferred an appeal under clause 15 of the Letters Patent.

Dr. Dwarka Nath Mitter and *Babu Nolin Chandra Pal* for the Appellants.

Babu Probodh Kumar Das (for *Mr. N. C. Bordaloi*) for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Roe in a suit for recovery of arrears of rent. One of the questions in controversy between the parties related to the amount of rent payable in cash. The Court of first instance decreed the claim in full. The Subordinate Judge on appeal modified that decree and allowed the plaintiff a decree at the rate admitted by the defendant. Before the Subordinate Judge, as before the trial Court, reliance was placed upon a petition of compromise filed in a previous suit for arrears of rent. This document embodied an agreement to pay Rs. 139-2, as rent for an area of 35 bighas. A question was thereupon raised, whether the document was admissible in evidence. The trial Court came to the conclusion that it was admissible in evidence. The Subordinate Judge took the contrary view. There can be no doubt that the opinion of the Subordinate Judge is supported by the decision of a Full Bench in *Lalit Mohan Ghosh v. Gopali Chuck Coal Company Ltd* (1), and the earlier decision of this Court in *Biraj Mohinee Dasee v. Kedar Nath Karmakar* (2). These cases show that a document which embodies a contract for variation of the rent payable in respect of a lease is in essence a lease, and is compulsorily registrable. If it is not registered in accordance with law, it is not only not admissible in evidence, it does not even constitute a valid and operative contract between the parties. The Subordinate Judge accordingly left the petition of compromise out of consideration and modified the decree of the Court of first instance. On appeal to this Court, Mr. Justice Roe has held that the plaintiff is entitled to succeed on the strength of an entry in the record of-rights. This entry, it may be conceded, is, under sub-section 3 of section 103 B of the Bengal Tenancy Act, evidence of the matter referred to therein and must be presumed to be correct until disproved by evidence to be incorrect. The Subordinate Judge held that the entry had been proved by evidence to be incorrect, when it was shown that the entry was based solely on the petition of compromise which, as we have already explained, did not constitute, in law, a

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(1) (1911) I. L. R. 39 Calc. 284; 14 C. L. J. 411.

(2) (1908) I. L. R. 35 Calc. 1010; 8 C. L. J. 90.

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valid and operative contract between the parties in modification of the pre-existing agreement between them. Mr. Justice Roe has held that the entry cannot be rebutted in this manner, but that other evidence must be adduced to prove that the entry is incorrect. In our opinion, sub-section (3) of section 103 B need not be interpreted in the manner suggested. In fact, if it is, as it has actually been, established that the only evidence whereon the entry was made by the Settlement Officer does not support his conclusion, that is the strongest possible proof that the entry is incorrect. The party is not limited to a particular mode of proof; he can prove *aliunde*, that the entry is in fact incorrect; but there is no reason why he should not achieve the same result by proof that the material whereon the Settlement Officer based his decision does not in law justify his conclusion as to the relative rights and obligations of the parties. We are of opinion that the view taken by the Subordinate Judge is correct and that his decree should not have been modified.

The result is that this appeal is allowed, the decree made by Mr. Justice Roe set aside and that of the Subordinate Judge restored with costs of two hearings in this Court.

A. T. M.

L. P. Appeal allowed.

Before Mr. Justice Beachcroft and Mr. Justice Walmsley.

JAGABANDHU PAL CHOWDHURY AND OTHERS

v.

HALADHAR PAL CHOWDHURY AND OTHERS.*

VII.

1917.

June, 11, 12, 22.

Mortgage decree—Transfer of decree to one of the mortgagors—Transfer of minor's share without leave of Court, if void—Assignee of mortgage decree, if can execute—Apportionment.

A transfer of a minor's interest by a certificated guardian without the leave of the District Judge, is voidable at the instance of any other person, that is, in addition to the minor, affected by the transfer.

A judgment-debtor assignee of a mortgage decree can execute it, by putting up the mortgaged property to sale. *Laldhari v. Manager, Court of Wards* (1) followed.

*Appeal from Order No. 387 of 1915, against the order of Babu Mahim Chunder Chakravarti, Second Subordinate Judge of Dacca, dated the 12th July, 1915.

(1) (1911) 14 C. L. J. 639.

A purchase by a mortgagor of the mortgagee's interest does not entitle the other mortgagors to apportionment of their debt.

Appeal by the judgment-debtors.

Application for execution.

The material facts appear from the judgment.

Babus Dwarka Nath Chuckerbutty, Hem Chunder Sen and Prokas Chunder Pakrasi for the Appellants.

Babus Mahendra Nath Ray, Rajendra Chunder Guha and Sasadhar Roy (No. 1) for the Respondents.

C. A. V.

The judgments of the Court were as follows :

Beachcroft, J—This is an appeal by the judgment-debtors against an order of the Subordinate Judge dismissing their objection and ordering execution to proceed in execution proceedings on a mortgage decree.

June, 22

On the 23rd August, 1894, fourteen persons took a patni lease in the names of four of their number paying a salami of Rs. 39,000. Partly for the purpose of raising the necessary funds sums of money had been borrowed by different combinations of these persons. In one of these transactions a mortgage bond for Rs. 12,000 was executed on the 17th August, 1894, by ten of the fourteen persons, though it was expressly stated in the mortgage bond that two of the ten had no interest in the property mortgaged.

On the 29th August, 1894, the fourteen persons executed an ekrarnama in which it was stated that the parties wished to settle their shares and make arrangements for the repayment of the debts so as to avoid disputes in future. The interests in the patni allocated to individuals were set out in a schedule and the individuals were arranged in two groups; one group of six having $5\frac{1}{2}$ annas and the other of eight having $10\frac{1}{2}$ annas in the patni. The ekrarnama set out in what proportion the debts were to be borne by the two groups. In short, the $5\frac{1}{2}$ anna co-sharers took the liability for Rs. 15,500 and the $10\frac{1}{2}$ anna co-sharers the liability for the rest of the debts amounting to Rs. 30,000. The liability for the Rs. 12,000 borrowed on the mortgage was divided, Rs. 4,000 to the $5\frac{1}{2}$ anna and and Rs. 8,000 to the $10\frac{1}{2}$ anna co-sharers.

The position with reference to the mortgage was now somewhat peculiar. Although all 14 persons had agreed among themselves to be liable for the debt, the individuals in each group being liable for the amount due from the group in proportion to their shares in the

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patni, only 8 persons were actually interested in the mortgaged property. These 8 had $9\frac{1}{4}$ annas in the patni; two others, who joined in the mortgage without having any interest in the mortgaged property, had $4\frac{1}{2}$ annas in the patni; the other four who did not join in the mortgage had $2\frac{1}{4}$ annas in the patni.

Various sums were subsequently paid by five of the persons and the payments were endorsed on the mortgage bond, but though it is stated on behalf of the appellants that they claim to have paid even more than their shares, according to the ekrarnama, the figures have not been worked out so as to enable us to say whether that claim is justified or not.

In course of time the mortgagees sued on their mortgage and on the 12th March, 1908, got a decree, the amount then due being upwards of Rs. 20,000. On the 7th February, 1912, the mortgagees sold their rights for Rs. 18,000 to Haladhar, one of the original fourteen persons, and the representatives of Raj Kishor, another of the original fourteen. Haladhar and Raj Kishor were two of the mortgagors; Raj Kishor's interest in the patni being $1\frac{1}{4}$ annas out of the $5\frac{1}{2}$ anna group and Haladhar's 2 annas out of the $10\frac{1}{2}$ anna group.

The present application for execution was made by the purchasers of the mortgagee's interest on the 31st March 1914. Objections to the execution were made on behalf of the present appellants, who represent Jugal Kishor, who had an one-anna share in the patni out of the $5\frac{1}{2}$ annas, and Krishna Mangal, Gangadhar and Jagabandhu, who had 3 annas out of the $10\frac{1}{2}$ annas.

The objection petitions contained a number of objections, but those urged before the Subordinate Judge appear to have been the following: (1) Limitation: (2) that the Rs. 18,000 had been paid on behalf of all the debtors and accepted in full satisfaction of the decree: (3) that under order 21 ru'le 16 of the Code of Civil Procedure, one of the judgment-debtors could not execute the purchased decree against the other judgment-debtors: (4) that the equities existing between the parties by reason of the ekrarnama should be worked out in the execution proceeding and not by separate suit: (5) that as the transfer included transfer of the interest of a minor made by the certificated guardian without the permission of the District Judge the transfer was inoperative. The Subordinate Judge decided against all these contentions.

The points now urged on behalf of the appellants are (1) that the transfer of the minor's share is invalid, therefore the transferees cannot execute the decree as a whole, and as the extent of the

minor's interest is unknown the decree is incapable of execution: (2) that the rights and liabilities of the parties can be worked out in the execution proceedings: (3) that the present decree-holders being interested in a portion of the equity of redemption there, ought to be an apportionment of the debt between the property held by them and the property held by other judgment-debtors: (4) that the purchase by some of the debtors was really a discharge of the debt as contemplated by the ekramnama.

The first point taken depends on the effect of the transfer of a minor's interest by a certificated guardian without the leave of the District Judge. Section 30 of Act VIII of 1890 provides that such a transfer is voidable not void at the instance of any other person *i.e.* in addition to the minor, affected by the transfer. In my opinion the objectors cannot question the validity of the transfer. They may be affected by action taken by the transferee subsequently to the transfer but they are not affected by the transfer itself.

The fourth point would appear to have been presented to the Subordinate Judge in a somewhat different light to that in which it has been put before us, viz., on the footing that the objectors had contributed to the purchase money, the purchase being made on behalf of all the judgment-debtors. We have not been referred to any portion of the oral evidence, and the ekramnama on which reliance was placed to support the argument does not contain any provision as to the effect of a purchase of the mortgage by some of the debtors, though there is a provision that a co-sharer who pays the debt of another co-sharer in anticipation of a suit will obtain the share in the patni of the defaulting co-sharer. This clause is evidently not sufficient to establish the contention put forward, assuming for the sake of argument that the ekramnama may be referred to to work out the equities between the parties.

A somewhat similar point which might perhaps have been advanced, though in fact it was not, is that the purchase was in substance, though not in form, a redemption of the mortgage and that the rights of the transferees were those possessed by one of several mortgagors who redeems the mortgage. The point in essence differs from that based on order 21 rule 16 which was taken before the Subordinate Judge, and which the learned pleader for the appellants expressly abandoned before us. But there is authority in *Laldhari Singh v. Manager, Court of Wards* (1) that a judgment-debtor assignee of a mortgage decree can execute it, by putting up the mortgaged property to sale.

(1) (1911) 14 C. L. J. 639.

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For the 3rd point the learned pleader for the appellants, admits that he can show no authority. His argument is that this is the converse of the case contemplated by section 60 of the Transfer of Property Act and that as a mortgagor is entitled to redeem his own share when the mortgagee has acquired the share of a mortgagor, the same rule applies when a mortgagor has acquired the interest of the mortgagee. He argues that the rule is founded on the union in the same person of the interest of the mortgagee and of one or more of the mortgagors, and as it applies when the mortgagee acquires the interest of a mortgagor it ought to apply also in the converse case. But the rule is not founded on the union of the two interests in one person, but on a result, which follows that union in the case where the mortgagee purchases the interest of a mortgagor but not in the converse case, namely that the mortgagee has by his purchase split up his security. The purchase by a mortgagor of the mortgagee's interest does not entitle the other mortgagors to apportionment of their debt. There remains the question whether the equities between the parties can be worked out in the execution proceedings or only by separate suits. What the appellants are in effect claiming is that they have individually paid off the shares of the debt due from them in accordance with the terms of the ekrarnama and that their share in the mortgaged property ought to be released from sale, or that they should be made liable individually only for such amounts by which their payments fall short of the amounts due in proportion to their shares in the patni. This obviously cannot be done. I have already pointed out that by the ekrarnama all fourteen persons divided between themselves the responsibility for the mortgage debt, but that the persons interested in the mortgaged property only had $9\frac{1}{2}$ annas in the patni. Supposing every one of the persons interested in the mortgaged property had paid up his share of the mortgage debt as allocated in the ekrarnama, a very large portion of the mortgage debt would still remain unsatisfied and for that portion of the debt the mortgaged property as a whole and not the shares of the individual members must remain the security : by no process of reasoning could the balance of the debt be thrown on one share rather than on another. And if it is sought to bring all the debts referred to in the ekrarnama into the account, that obviously cannot be done in this execution proceeding as it would bring in persons who were not parties to the suit. I am therefore of opinion that the appeal should be dismissed.

There is however an order which we can make and which I think we ought to make, concerned as we are with seeing that formalities

of procedure should not be allowed to obscure substantial justice between the parties.

As already mentioned, various payments were made on the mortgage; one was of Rs. 2057 made in respect of Raj Kishor's share of the debt, on the 6th Aswin 1302. Nothing has been paid in respect of what is admitted by Haladhar's share of the debt. His original share would be 2 annas out of 10½ annas, i.e. $\frac{4}{11}$ of Rs. 8,000. By now it will have amounted to a very much larger sum; Raj Kishor by his payment of Rs. 2,057 may or may not have paid the full amount due for his share, which was originally $\frac{5}{11}$ of Rs. 4000. A large portion of the judgment debt is therefore due from the decree-holders themselves. They cannot be allowed to sell the property for the whole debt, which is largely swollen because they have failed to carry out their own undertakings. It must be taken that they have paid to themselves the amount due from themselves. A calculation must be made of the amount due in respect of the shares of Raj Kishor and Haladhar on the footing above indicated and the amounts so found must be deducted from the sum for which execution is levied, satisfaction for those amounts being entered.

The parties to this appeal will bear their own costs.

Walmsley, J.—I agree.

A. T. M.

Appeal dismissed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

BANDIRAM MOOKERJEE

v.

PURNA CHANDRA ROY.*

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1917.

August, 21, 22.

Appeal—Appellate decree passed without jurisdiction—'Contrary to law'—Civil Procedure Code (Act V of 1908), section 100, sub-sec. (1):

No Court can entertain an appeal which it is not expressly authorised by law to hear.

* Appeal from Order No. 1 of 1917, against the decision of G. B. Mumford Esq., District Judge of Birbhum, dated the 19th September, 1916, modifying that of Babu N. N. Chatterjee, Subordinate Judge of Birbhum, dated the 26th July, 1916.

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An appeal lies against an appellate decree passed without jurisdiction, as the decision is contrary to law within the meaning of section 100, sub-section (1) of the Code of Civil Procedure.

Ranjit v. Ramnadar (1) followed.

Application for execution of a mortgage decree.

The material facts and arguments appear from the judgment.

Babus Bepin Behary Ghose (II) and *Sarat Chandra Dey* for the Appellant.

No one appeared for the Respondent.

The judgment of the Court was delivered by

August, 22.

Mookerjee, J.—This is an appeal from an appellate order passed in execution proceedings on the basis of a decree in a mortgage suit which was valued at above Rs. 5,000. The order of the District Judge, which modifies the order of the Subordinate Judge, is challenged on the ground that the appeal from the order of the Subordinate Judge lay to this Court and not to the District Judge. This contention is clearly well-founded.

Section 21, sub-section (1) of the Bengal Civil Courts Act, 1887, provides that an appeal from a decree or order of a Subordinate Judge shall lie to the District Judge, where the value of the original suit in which or in proceedings arising out of which the decree or order was made does not exceed Rs. 5,000 and to the High Court in any other case. In the case before us, the value of the original suit exceeds Rs. 5,000. Consequently, an appeal against an order made in a proceeding arising out of the decree in the suit lies to this Court and not to the Court of the District Judge. The order of the District Judge was consequently made without jurisdiction. The question thus arises, whether this Court is competent to reverse that order in the exercise of appellate jurisdiction.

There can be no question that the order of the District Judge, made under section 47, is a decree within the meaning of section 2 of the Civil Procedure Code. As the order was passed in appeal, a second appeal lies to this Court under section 100, provided the reason assigned in support of it, namely, that the District Judge acted without jurisdiction, falls within the scope of one or other of the three clauses of sub-section (1) of that section. The decision of the District Judge is, in our opinion, contrary to law; for, although he does not explicitly state that he was competent to hear the appeal which had been preferred to him contrary to the provision of section 21 of the Bengal Civil Courts Act, yet his decision

(1) (1912) 16 C. L. J. 77.

necessarily implies that he had jurisdiction to entertain the appeal; it is an elementary rule that no Court can entertain an appeal which it is not expressly authorised by law to hear. We must hold accordingly that the decision of the District Judge is contrary to law because passed without jurisdiction, and must be set aside by this Court under section 100, Civil Procedure Code. This view is in conformity with the principle recognised in *Ranjit Misser v. Ramudar Singh* (1), namely, that when a decree has been made without jurisdiction, an appeal lies against it precisely in the same manner as if it had been made with jurisdiction. This doctrine has been repeatedly affirmed in a long line of cases. *Abdul Hossain v. Kasi Sahu* (2), *Kalipada v. Shekhar Basini* (3), *Jawala Prasad v. Salig Ram* (4) and *Perumul v. Rajagopala* (5). This view is also supported by the terms of section 99, Civil Procedure Code, which applies to appeals from appellate decrees by virtue of section 108.

The result is that this appeal is allowed, the order of the District Judge set aside and that of the Subordinate Judge restored. We do not, however, express any opinion as to the correctness of the order of the Court of first instance.

As the point was not taken in the lower appellate Court and as the present appeal has not been opposed, there will be no order for costs either here or in the Court of appeal below.

A. T. M.

Appeal allowed.

(1) (1912) 16 C. L. J. 77.

(2) (1899) I. L. R. 27 Calc 362.

(3) (1916) 24 C. L. J. 235.

(4) (1891) I. L. R. 13 All. 575.

(5) (1889) I. L. R. 13 Mad. 248.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

PITAMBAR DHAL AND ANOTHER

v.

BAIDYANATH SHET AND OTHERS.*

Appeal—Suit, dismissal of, under O. 9, R. 4 of the Code of Civil Procedure (Act V of 1908).

No appeal lies against an order refusing to set aside a dismissal of a suit under rule 4 of Order 9 of the Code of Civil Procedure.

* Appeal from Order No. 81 of 1917, against the decision of Babu Bhupal Chandra Singh, Subordinate Judge of Midnapore, dated the 9th December, 1916.

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August, 24.

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Baidyanath.

August, 24.

Appeal by the Plaintiff.

Suit in *forma pauperis*.

The material facts and arguments appear from the judgment.

Babu Sitaram Banerjee for the Appellant.*Babu Santosh Kumar Pal* for the Respondent.

The judgment of the Court was delivered by

Mookerjee, J.—The preliminary objection, taken to the competency of this appeal, is well-founded and must prevail. The appellants instituted a suit in *forma pauperis*. On the day fixed for trial, when the suit was called on, neither the plaintiffs nor the defendants entered appearance. The result was that the suit was dismissed under rule 3 of order 9 of the Code, which provides that where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed. The plaintiffs thereupon applied for an order to set the dismissal aside. This application was made under order 9, rule 4 and was dismissed on the merits. Against the order of dismissal the present appeal has been preferred. Order 43, rule 1 clause (c) shows that an appeal lies against an order under rule 9 of order 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit. Rule 9 applies to cases under rule 8, that is, cases where the defendant appears and the plaintiff does not appear and the suit is accordingly dismissed for default. The Code distinguishes between cases where neither party appears and cases where the plaintiff is absent and the defendant appears. These are two classes of cases contemplated by rules 3 and 8 respectively, and the application for restoration are made under rules 4 and 9. It is worthy of note that whereas an appeal is allowed against an order refusing to set aside a dismissal of a suit under rule 9, no appeal is allowed against an order refusing to set aside a dismissal of a suit under rule 4. The present case is covered not by rule 9 but by rule 4. The appeal is accordingly dismissed with costs. We assess the hearing-fee at one gold mohur.

A. T. M.

Appeal dismissed.

Before Sir Charles Chitty, Knight, Judge and Mr. Justice Richardson.

BISWANATH SINHA AND OTHERS

v.

KALICHARAN SINHA AND OTHERS.*

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June, 15, 30.

Civil Procedure Code (Act V of 1908), Order XIII, Rr. 1, 2, Order XVII, R. 1—Hearing of the suit—Evidence, production of—Delay, if, reasonable—Discretion—Appellate Court, interference by—Hindu Law—Mitakshara—Adoption—Daughter's daughter's son.

Order XVII, rule 1 of the Code of Civil Procedure which gives the Court power to adjourn the hearing of a suit draws a distinction between the hearing of the suit and the hearing of evidence

Held, therefore, that the trial Court had, under order XVII, rule 2 of the Code, a discretion to refuse to accept the documentary evidence on which the plaintiffs intended to rely, and which were not produced before the date fixed for the hearing of the suit, on which date the parties had been directed to produce their documentary evidence, though the hearing resulted only in an adjournment.

Held also, that the appellate Court ought not to interfere with the discretion exercised by the trial Court on the question whether the delay in producing the documentary evidence was or was not unreasonable, unless it is satisfied that the trial Court exercised the discretion improperly or capriciously.

Under the Mitakshara the adoption of a daughter's daughter's son in a family coming from Rajputana in Western India, is valid.

Ram Chandra Krishna Joshi v. Gopal Dhondo Joshi (1), *Yamnava Kom Govind Appaji v. Laxman Bhimrao Kulkarni* (2) and *Gajanan Balkrishna Deshpande v. Kashinath Narayan Deshpande* (3) followed.

Appeal by the Plaintiffs.

Suit for declaration of title to and recovery of possession of certain immovable property.

The material facts and arguments will appear sufficiently from the judgment.

Mr. C. R. Das, *Babus Biraj Mohan Mojumdar*, *Tarakeswar Pal Chowdhury*, *Dhirendra Krishna Ray* and *Kshitish Chandra Chakravarty* for the Appellants.

Sir S. P. Sinha, *Babus Dwarka Nath Chuckerbutty*, *Mohini Mohon Chatterjee*, *Sarat Kumar Mitter* and *Kali Kinkar Chakravarty* for the Respondents.

C. A. V.

* Appeal from Original Decree No. 454 of 1913, against the decree of Babu Chandra Bhushan Banerjee, Subordinate Judge of Murshidabad, dated the 13th August, 1913.

(1) (1908) I. L. R. 32 Bom. 619.

(2) (1912) I. L. R. 36 Bom. 533.

(3) (1915) I. L. R. 39 Bom. 410.

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1916.

Biswanath

v.
Kalicharan.

June, 30.

The judgment of the Court was delivered by

Chitty, J.—The plaintiffs in this suit are the great-grandsons of one Tularam Singh who as they allege was the brother of Khoshal Sinha. Khoshal died many years ago leaving a widow named Bhagabati and a son named Shibram. Shibram himself died in 1836 leaving a widow, Chhaya Kumari, a mere child, whom he had married as his second wife. There also survived him Tudan Kumari, his daughter by his first wife, and her husband Chetlal. They had issue, two sons then alive, Ram Lal and Behari Lal, and several daughters born subsequently. Behary Lal died in 1837 and Ram Lal in 1868. Of the daughters Golap Sundari became the mother of a son named Nil Kantha, the father of the defendant No. 1 Kali Charan Sinha. Annapurna also had a son whose widow is the defendant No. 2. The defendant No. 3 is in possession of a property, Taraf Raghav Bati, (No. 13 in the schedule of the plaint), under colour of a conveyance executed by Chhaya Kumari and Nilkantha Singh in 1887.

A genealogical table prepared by the plaintiffs is attached to the plaint. The plaintiffs claim title, as reversionary heirs of Shibram on the death of Chhaya Kumari, which occurred in 1899, to three-fourths of the properties specified in the schedule. The title to the remaining fourth is said to be in another great-grandson of Tularam who is not represented on the record. There is no dispute as to the descent of the plaintiffs from Tularam. The two principal contentions raised in answer to the suit were firstly that Tularam was not the brother of Khoshal and *secondly* that in accordance with an alleged verbal permission given by Shibram, Chhaya Kumari in the year 1872 adopted Nilkantha as his son. The learned Subordinate Judge found against the plaintiffs on both these questions and by his judgment and decree dated the 13th August, 1913, dismissed the suit. The plaintiffs have appealed.

At the hearing before us, learned counsel for the appellants stated that as regards the relationship between Khoshal and Tularam he would urge merely that the suit should be remanded to the Court below for the taking of further evidence, on the ground that evidence, oral and documentary, bearing on this question, had been improperly excluded at the trial. He referred to the orders dated the 14th and the 17th July, 1913, in the order sheet. The order sheet shows that the suit was instituted on the 18th November 1911. On the 20th April 1912, permission was given to the plaintiffs, who it is said are mostly serving as peons, that is in comparatively humble and ill-paid posts, to sue in *forma pauperis*, a privilege which has also been extended to them in appeal. Issues were framed on the

7th September 1912, and the 8th October was fixed for the hearing of the suit, on which date the parties were directed to produce their documentary evidence. On that day nothing was done. The suit was adjourned again and again at the instance of one or the other of the parties or both. The dates successively appointed were the 12th November and 12th December, 1912, and the 21st January, 24th February, 7th April, 7th May, 9th June and 10th July, 1913. On the last mentioned date the case was opened and adjourned to the 14th July when the hearing was resumed and continued practically *de die in diem* till the conclusion. Now the rejected documents ought to have been produced on the 8th October 1912, but were not in fact produced till the 24th February, 1913, a delay which would allow of ample time for their manufacture. The excuse given was that the original plaintiff No. 1 the elder brother of the present plaintiff No. 1, had died on the 4th September, 1912, and the documents had been in his custody. The Subordinate Judge directed that the documents "should be kept with the record" leaving the question of their admission to be decided at the trial. On the 14th July, 1913, he refused to accept them stating that the explanation of delay was unsatisfactory. He also said, that a list should have been attached to the plaint in which the documents should have been specified. It was suggested that he was wrong in thus applying rules 14 and 18 of order VII, because sub-rule (2) of rule 18 expressly excepts "documents produced for cross-examination of the defendant's witnesses or in answer to any case set up by the defendant." The documents in question have however been translated and printed and it appears it was proposed to use them in aid of the plaintiffs' own case that Tularam was Khosal's brother. In any case the Subordinate Judge might have applied rules 1 and 2 of order 13. As the plaintiffs intended, if they could, to prove the documents as part and parcel of the evidence in support of their claim, they intended to rely on them and under order XIII rule 1 "the parties or their pleaders shall produce at the first hearing of the suit all the documentary evidence in their possession or power on which they intend to rely....., and all documents which the Court has ordered to be produced." Under rule 2, "no documentary evidence not produced under rule 1, shall be received at any subsequent stage of the proceeding unless good cause is shown to the satisfaction of the Court for the non-production thereof and the Court receiving any such evidence shall record the reasons for so doing." Rule 1 speaks of the first hearing of the suit but no difficulty arises as to that because the word "hearing" is one of those

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comprehensive words which may be used with a more or less extensive meaning according to the context. Order XVII Rule 1 which gives the Court power to adjourn the hearing of a suit draws a distinction between the hearing of the suit and the hearing of evidence. There was a hearing of the suit if not on the day when issues were settled, at any rate on the 8th October, 1912, though the hearing resulted only in an adjournment. There is no doubt therefore that under the Code the Subordinate Judge had a discretion to refuse to accept these documents and on the question whether the delay in producing them was or was not unreasonable, he, having heard the parties and their pleaders before him, was in a better position to judge than we are. We ought not to interfere especially in view of the terms of rule 2 of order XIII, unless we are satisfied that the Subordinate Judge exercised his discretion improperly or capriciously and we are not so satisfied.

We may add that we are not of course in a position to say whether these documents are authentic or not or to express any opinion on the point. So far however, as our attention was drawn to them we were not much impressed with the contents. The Subordinate Judge may have been equally unimpressed when the documents were shown to him. It may be mentioned that on the 26th July, 1911, the Subordinate Judge permitted the plaintiffs after the close of their case to tender and exhibit two documents of undoubted authenticity, namely, the deposition of Chhaya Kumari and the judgment of the High Court in a suit commenced in 1879 to which we shall refer later.

Then as to the oral evidence which it is said was shut out, it appears that on the 17th July, 1913, during the trial, when the plaintiffs had come to the end of the witnesses whom they had in attendance, they applied for one day time to produce two more witnesses. This would have meant a break in the proceedings inconvenient to everybody concerned. The parties had certainly had ample time to prepare their respective cases and to obtain process for their witnesses. The Subordinate Judge was perfectly justified in refusing the application and in going on with the evidence for the defence. No complaint can be reasonably made on this score.

As it is conceded and it seems to us properly conceded, that on the evidence on the record, the plaintiffs have failed to establish the relationship between Tularam and Khoshal on which their case depends, we might stop here. But it will probably be more satisfactory if we also deal with the question of the adoption of Nilkantha,

to which the greater part of the argument before us was addressed. The adoption was not mentioned in the plaint but was plainly set up in the written statements of the defendant No. 1 (paras. 11 and 12) and the defendant No. 3 (para. 3). It was to the interest of the defendant No. 2 to deny the adoption and she did so in the written statement which she filed. But as she took no further part in the suit and has not entered appearance in this appeal, her attitude is of little consequence. Curiously enough, among the issues, as they were originally framed, there was none expressly relating to the adoption, though the seventh issue (whether the plaintiffs were the nearest heirs of Shibram and entitled to succeed to the properties left by him) may have been wide enough to cover the question. The Subordinate Judge says in his judgment that he raised an issue (now numbered 11) after both sides had closed their evidence and during the arguments of the defendants' vakil. He adds "I was quite prepared to give time to the parties and adjourn the hearing, but all the parties stated before me that they had no further evidence and hence the hearing was not adjourned."

The issue is : "Whether the adoption of Nilkantha Singh father of the defendant No. 1, Chhaya Kumari was legally valid according to Hindu Law."

The factum of the adoption with the performance of the usual ceremonies is admitted and the points which arise are:—

1. Whether Chhaya Kumari had the necessary authority from her husband to make the adoption, and

2. Whether a daughter's daughter's son can be legally and validly adopted under the Hindu Law by which the parties are governed.

As to the first point, the permission relied on is a verbal permission and there are now no witnesses alive who can speak with personal knowledge on the subject. The evidence for the defendants or the contesting defendants consists of mostly of transactions which extend over a long period of time and illustrate the conduct of members of the family and those most competent to form an opinion on the validity of the adoption. From these transactions it is sought on behalf of the defendants to draw the inference that Chhaya Kumari was capable of making, and did in fact make, an adoption valid not only in point of form but also in point of authority. Perhaps not less important is the long inaction of the plaintiffs and their predecessors in interest.

[Here their Lordships discussed the evidence on the 7th point.]

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In all the circumstances we see no reason to disturb the conclusion arrived at by the learned Subordinate Judge.

Something was said in the course of the argument as to the admissibility in evidence of some of the documents to which we have referred though no question of the kind seems to have been raised in the trial Court. Clearly any transaction by which the right of Chhaya Kumari to adopt "was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence" is evidence under section 13, clause (a), of the Evidence Act. And under clause (7) of section 32 of the same Act, statements of relevant facts made by deceased persons are themselves relevant "when the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a)." Regard being had to the part which Chhaya Kumari played in making the adoption, any recorded statement of hers is admissible in evidence under section 158 of the Act. This applies to the statement in the application of 1836, so far as it can be regarded as a statement of hers, to her pleadings in the litigation of 1844-45 and her later depositions of 1879 and 1891. The deed of gift executed by Nilkanta's natural father in 1871 was certainly a transaction or part of the whole transaction of adoption by which the right was directly and positively asserted and acted upon. Statements in that document made by the father are therefore admissible in evidence for what they may be worth. We have used them merely to show that the adoption was contemplated some years previously.

After the adoption, the various applications made to the Collector for the purpose of rectifying the land register and Chhaya Kumari's deed of relinquishment, were again transactions by which Nilkanta's rights and possession as adopted son were actively asserted. So too were the instalment bond of 1883 and the conveyance of 1887.

Moreover, it must be borne in mind that the judgment of 1881 was one of the only two documents which the plaintiffs exhibited. It recounts the earlier facts and cannot be properly understood without reference to those facts. The plaintiffs did not use it merely as evidence of a suit or transaction in which the power to adopt was denied and the Court finally refused to pronounce against the validity of the adoption, so used it would be evidence against them. The other document put in by the plaintiffs was Chhaya Kumari's deposition of 1879. That must be read with her other

deposition of 1891. Perhaps neither deposition is of much importance compared with what was actually done by this lady.

We do not of course desire to encourage any laxity in the admission of evidence, but in cases of this kind it is often difficult to shut out the only sources of information available to the parties. At the trial, both parties use what evidence there is indiscriminately according to their interest or convenience and it is only the unsuccessful party who afterwards objects.

As to the legality of the adoption of a daughter's daughter's son, the question was not completely argued before us. It may be conceded that the respondents have failed to prove any special family custom such as that set up in para. 12 of Kali Charan's written statement. But as the family is governed by the Mitakshara and comes from Rajputana in Western India, we may be guided by the current of authority in the Bombay High Court and hold that the adoption of a daughter's daughter's son is not illegal: *Ram Chundra v. Gopal* (1); *Yamnavi v. Laxman* (2); *Gajanan v. Kashinath* (3).

According to the view we take it is not necessary to deal with the particular case of the defendant No. 3. If we had to come to a determination upon it, we should agree with the Subordinate Judge. In fact the appeal as against this defendant was not pressed.

In the result the appeal must be dismissed with costs. There will be one set of costs to be divided between the defendants Nos. 1 and 3.

A. N. R. C.

Appeal dismissed.

(1) (1908) I. L. R. 32 Bom. 619.

(2) (1912) I. L. R. 36 Bom. 533.

(3) (1915) I. L. R. 39 Bom. 410.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

DIGENDRA CHANDRA SEN AND ANOTHER

v.

NRITYA GOPAL BISWAS AND OTHERS.*

Suit, maintainability of—Manager of Court of Wards—Power to institute suit without Court's sanction—Suit, if can proceed without Court's order—Court of Wards Act (IX B. C. of 1879), sec. 55.

* Appeal from Appellate Decree No. 3567 of 1914, against the decree of G. B. Mumford Esq., District Judge of Faridpur, dated the 13th July, 1914, reversing that of Babu Sidheswar Chakravarty, Subordinate Judge of Faridpur, dated the 10th September, 1913.

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v.

Kalicharan.

Chitty, J.

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1917.

February, 19.
June, 22.

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1917.

Digendra

v.

Nriya Gopal.

The law gives the manager of a Court of Wards, power to file a suit in anticipation of the sanction when the suit would otherwise be barred by limitation. Such a course should be adopted where there is very little time left to get the authority of the Court of Wards.

Though a plaint may be filed in order to prevent a suit from being barred by limitation, the suit shall not be proceeded with except under the order of the Court. If a suit be proceeded with without such order, all proceedings taken subsequently to the filing of the plaint, being without jurisdiction, should be set aside.

In the circumstances of the case, the land being chur land, the manager of the Court of Wards was held justified in instituting the suit without the authority of the Court of Wards, although there was some time between the date of the institution of the suit and the date on which the limitation would expire from the time when the cause of action arose.

Appeal by Defendants Nos. 3 and 14.

Suit for recovery of possession of certain lands on establishment of the plaintiffs' title thereto.

The material facts appear from the judgment.

Babus Surendra Chandra Sen and Dwijendra Nath Mukerjee for the Appellants.

Babu Ram Churn Mitra and Akshoy Kumar Banerjee for the Respondents.

This judgment of the Court was as follows :

June, 22.

This appeal arises out of a suit by the plaintiffs who are wards under the Court of Wards.

The suit which was instituted by their next friend Mr. Monier, Manager of the Court of Wards, was one for recovery of possession of certain lands on establishment of the plaintiffs' title thereto. It appears that there was a partition of the estate within which these lands were situate, between the plaintiffs and the defendant No. 1. The partition took place in Chait 1305 corresponding to April 1899. The plaintiffs' case was that these lands were part of the estate which fell to their share, that they went under water and then rose again in Kartik 1306 corresponding to October 1899. The suit was instituted on the 18th April 1911 (the Court having been closed from the 13th to 17th April, 1911) and was within 12 years from the 1st Baisak 1306 corresponding to 13th April, 1899. It was, however, instituted without the authority of the Court of Wards.

Section 55 of the Court of Wards Act provides that "No suit shall be brought on behalf of any ward by a Manager unless the same is authorised by some order of the Court, provided that a

Manager may authorise a plaint to be filed in order to prevent a suit from being barred by the law of limitation : but such suit shall not be afterwards proceeded with except under the sanction of the Court."

It appears that after the suit had been instituted, the plaintiffs applied for summons on their witnesses and a commissioner was appointed for local investigation. He submitted his report on the 9th April 1912. The manager did not obtain sanction of the Commissioner until the 27th November, 1912, and the sanction was actually filed in Court on the 5th September 1913.

The Court of first instance dismissed the suit entirely. On appeal, the learned District Judge partly decreed the suit and the defendant No. 3 who is a tenant under the defendant No. 1, and the defendant No. 14 who is a tenant under the defendant No. 3 and his co-sharers, have appealed to this Court.

Two contentions have been raised in this appeal. The first is that the suit having been instituted without the authority of the Court of Wards, should be dismissed ; and secondly that, at any rate, the suit having been proceeded with without the sanction of the Court, the proceedings should be set aside and the case tried *de novo*.

So far as the first question is concerned, we think that the suit should not be dismissed. No doubt, section 55 says that no suit shall be brought on behalf of any ward by a manager unless the same is authorised by some order of the Court : but, at the same time, it provides that a manager may authorise a plaint to be filed in order to prevent a suit from being barred by the law of limitation. The law, therefore, gives the manager power to file a suit in anticipation of the sanction when the suit would otherwise be barred by limitation. Such a course should be adopted where there is very little time left to get the authority of the Court of Wards. In the present case there was, no doubt, sometime between the date of the institution of the suit and the date on which 12 years would expire from the time when the cause of action is said to have arisen. The land however was chur land and it is always difficult to fix the precise time when any chur appeared above water and formed into land. As a matter of fact, a portion of the land was held by the lower appellate Court to have been barred by limitation. Under the circumstances we think that the manager was justified in instituting the suit on the 18th April, 1911, which was within 12 years of the date of the partition, instead of taking the risk of having the suit being held barred if instituted within 12 years of the

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reformation of the land. Under the special circumstances of the case we think the suit is one which comes under the proviso to section 55. In the case of *Dinesh Chunder Roy v Golam Mustapha* (1), the suit which was instituted without the authority of the Court of Wards was held to have been rightly dismissed by the lower appellate Court. But in that case the sanction was filed only in the appellate stage, and there were no special circumstances as there are in the present case, in which moreover the sanction was filed before the actual trial commenced.

The appellants, however, we think, are entitled to succeed on the second ground. Although the proviso to section 55 lays down that the manager may authorise the plaint to be filed in order to prevent a suit from being barred by limitation, it expressly provides that such suits shall not be proceeded with except under the orders of the Court. We find that, in the rules made by the Board of Revenue under section 50 of the Court of Wards Act and printed at page 93 of the Bengal Ward's Manual, 1909, it is stated that "authority from the Manager need not be filed but commissioner's authority to institute a suit should be filed as soon as it has been obtained, and when the suit is filed in anticipation, the circumstances should be stated and the Court asked to stay proceedings till it is received. The suit should be filed in anticipation only when such filing is necessary to save limitation." In the present case, although the suit was instituted on the 18th April 1911, the Court was not asked to stay proceedings, and it was after the Amin had submitted his report which was partly favourable to the plaintiffs, that the sanction was obtained on the 27th November, 1912 and it was not filed in Court until the 5th September, 1913. This was contrary to the rules framed by the Board of Revenue. But apart from that, section 55 clearly says that though the plaint may be filed in order to prevent a suit from being barred by limitation, the suit shall not be proceeded with except under the orders of the Court. That being so, all the proceedings which were taken subsequently to the filing of the plaint, were without jurisdiction and must, therefore, be set aside.

The result is that the decrees of the Courts below must be set aside and the suit remanded to the Court of first instance for a trial *de novo*. The proceedings are to be taken from the stage of filing of the plaint.

The respondents must pay the costs of the appellants in all the Courts.

A. T. M.

Appeal allowed: Case remanded.

(1) (1883) I. L. R. 16 Calc. 89.

Before Mr. Justice Richardson and Mr. Justice Walmsley.

GOLAPDI MEAH AND OTHERS

v.

PURNO CHANDRA DUTT AND OTHERS.*

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1917.

March, 15, 16, 19.

Joint Hindu family—Karta, power of—Non-transferable occupancy holding, transfer of—Recognition of transfer by karta, if binds other members of the family.

A consent given by the *karta* of a joint Hindu family to a transfer of a non-transferable occupancy holding, held by the tenants under the joint family as landlords, is binding on other members of the family.

Chuckun Lall Singh v. Poran Chunder Singh (1) referred to

Appeal by some of the Defendants.

Suit for recovery of khas possession.

The material facts and arguments will appear sufficiently from the judgment of Walmsley J.

Sir Rash Behary Ghose and *Babu Probodh Chandra Roy* for the Appellants.

Babu Manmatha Nath Mukherjee for the Respondents.

C. A. V.

The following judgments were delivered :

Richardson, J.—I have read the judgment prepared by my brother Walmsley and concur in it. On the question of the extent of the *karta's* authority which is raised, I had little doubt during the argument that the *karta* of a joint Hindu family has authority to consent on behalf of the joint family to the transfer of an occupancy holding held by the tenants under the joint family as landlords and not transferable without their consent duly given by themselves on their behalf.

March, 19.

Walmsley, J.—This is an appeal by defendants 2 to 7 against a judgment by the learned Subordinate Judge of Faridpur who reversed the decision of the first Court and decreed the plaintiff's suit. The circumstances are as follows. The Dutt family, to which the plaintiffs belong, hold a certain tenure, and within that tenure the land in suit was let out to two tenants named Dinu and Menajuddin in 1878. Their interest was that of occupancy raiyats,

* Appeal from Appellate Decree No. 3191 of 1914, against the decree of Babu Beeroja Charan Mitra, Subordinate Judge of Faridpur, dated the 7th August, 1914, reversing that of Babu Kumud Behary Gupta, Munsif at Goalando, dated the 20th August, 1913

(1) (1868) 9 W. R. 483.

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v.

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Walmsley, J.

without the right of transfer, except with the consent of their landlords. The Dutt family consisted of three brothers—Khudiram, Mohesh and Kodai. Plaintiff No. 1 Purna is the son of Kodai, and Plaintiff No. 2 Soshti, is the son of Mohesh. Khudiram had three sons: Kalicharan, Ramcharan, and Soshi Mohan. Kali Charan is defendant No. 8 and Soshi Mohan is defendant No. 9. Kalicharan's wife is Jay Durga Sundari Dasi, defendant No. 1. Sometime before 1900, Dinu and Menajuddin borrowed money from Jay Durga and mortgaged the holding to her: She brought a suit on the mortgage, and in execution of the decree she caused the holding to be put up for sale, and then bought it herself, on November 24, 1900: She was put in possession in the following year. On November 29, 1910, she let out the land to the defendants Nos. 2 to 7, now the appellants, and they paid her a bonus of 700 Rs. On November 26, 1912, Purna instituted the present suit for recovery of khas possession to the extent of his one-third share, and his cousin Soshti subsequently joined him as plaintiff. Jay Durga filed one written statement, and defendants Nos. 2 to 7 another, but Jay Durga has not joined in the present appeal.

The learned Munsif found that Jay Durga had changed sides after filing her written statement, and on the merits of the case he held that the mortgage to Jay Durga was effected with the consent of the plaintiffs and their co-sharers, that Soshi Mohan Dutt was *karta* of the family, and that he actually conducted the mortgage suit on behalf of Jay Durga, and consented to her purchase of the holding at the auction sale, that Jay Durga was recognized by the plaintiffs and in particular by Soshi Mohan, the *karta* as their tenant, and that she held possession of the land for several years through her *bargaits*, and latterly through the defendants Nos. 2 to 7, and that these defendants took settlement from her in good faith and paid her 700 Rs. as *najarana*. He also held that apart from the landlords' recognition of Jay Durga, the defendants were entitled to retain possession on the double ground that they are settled raiyats of the village, and that they took settlement from Jay Durga in good faith, believing her to be entitled to admit them to the land.

On these findings the plaintiff's suit was dismissed.

Before the learned Subordinate Judge on appeal it was urged that the Munsif was wrong in holding that Jay Durga's purchase had been recognized; that he had taken an erroneous view of Jay Durga's conduct in the suit; and that the circumstances did

not warrant the first Court's view as to the effect of the settlement by Jay Durga. These contentions were upheld.

In this Court defendants Nos. 2 to 7 are the appellants. A preliminary objection is taken on behalf of the plaintiff Soshti that when the appeal was filed in November 1914, the name of the second plaintiff was given, not as Soshti but as Judishthir, and that the mistake was not corrected until July, 1915. It appears however that in the copy of the lower appellate Court's decree, the name was written as Judishthir, and that being so the mistake was a pardonable clerical error for which the appellants should not be penalized.

The main argument advanced on behalf of the appellants is that the consent given to a transfer of an occupancy holding, not transferable by custom, by the *karta* of a joint Hindu Family is binding on other members of the family, in short that Soshi Mohan's consent to Jay Durga's purchase binds the plaintiffs.

There is no dispute about the fact that up to some date later than Jay Durga's purchase and the delivery of possession to her, the family was and continued to be a joint Hindu family and that Soshi Mohan was its *karta*.

The learned Subordinate Judge held that the first Court was wrong about the matter of recognition on four grounds—viz., (a) that the dakhilas, Exs. E and F, purporting to have been granted by Purna to Jay Durga were not genuine; (b) that Purna was a mere boy during his so-called acquiescence in Jay Durga's possession; (c) that the presumption arising from the entry of Jay Durga's name in the Record of Rights had been rebutted; and (d) that the acts of a *karta* in relation to properties that are not joint family properties does not bind the other members of a family. It is with the last point that we are now concerned. Sir Rash Behary Ghose on behalf of the appellants, concedes that he cannot refer us to any case in which the power of the *karta* to recognize a transfer has been affirmed. On the other hand, there is no decision to the opposite effect. The powers of a *karta* are described in the case of *Chuckun Lall Singh v. Poran Chunder Singh* (1), and it seems to me that they must include this power to recognize a transfer. The learned vakil for the plaintiffs seeks to avoid this conclusion by arguing that the holding that was sold belonged to the mortgagors, and that the mortgagee who bought it was not a member of the joint family, and this I think must be the meaning of the Subordinate Judge's words—"acts in connection with properties which are not joint family property." The fallacy of the argument, I think, lies in the fact that

(1) (1868) 9 W. R. 483.

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the rights of the mortgagors, and of the mortgagee-decree-holder-auction-purchaser do not exhaust the whole bundle of rights involved in the transaction. There is also the land-lord's right to give or withhold his consent to the transfer; this I regard as part of the joint family property, and, as such, I think it comes within the scope of the control exercised by the karta of the joint family. If therefore there has been recognition of the transfer by Soshi Mohan as *karta* of the family, the plaintiffs are bound by that recognition. The learned Munsif found explicitly that there had been such recognition, and this finding is not displaced in the judgment of the lower appellate Court: in fact the correctness of the finding does not seem to have been questioned, and the learned Judge accepted it without discussion.

I have said above that there is no dispute about the family being joint in property. I should mention however that in this Court we were asked on behalf of the respondents to note that the *kabulyat* of 1878 was in favour of the three sons of Khudrain, and not of a *karta*, and that Jay Durga alone took a mortgage of the holding. These facts are not of much importance, but the question is not one which we can enter into now, because both the lower Courts find that the family was joint in property.

Another argument used for respondents is that the appellants have really changed their case, and that recognition by the *karta* is a late development, but this argument ignores the important words of paragraph 9 of the written statement where it is said that Soshi Mohan "who was *karta* of the family at the time" settled the amount of *nazar* to be paid to Jay Durga. This is explicit enough. For the reasons given I would allow the appeal, set aside the decree of the lower appellate Court, and restore that of the first Court, dismissing the suit, with costs in all Courts.

A. N. R. C.

Appeal allowed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr.
Justice Walmsley.*

ABDUL RAHAMAN KAZI AND OTHERS

v.

BAIKUNTHA NATH ROY CHOWDHURY AND OTHERS.*

Evidence—Mal land—Purchaser of an entire estate—Revenue sale.

CIVIL.

1917.

July, 3, 4

The purchaser of an entire estate at a revenue sale takes the estate as created at the time of the Permanent Settlement. Merely because the lands are situated within the geographical limits of the estate purchased, it cannot be said that they were *mal* lands and formed part of the zemindari at the time of the Permanent Settlement. The auction-purchaser must prove that the revenue was assessed on the basis of the assets of those lands.

Appeal by the Defendants.

Suit for recovery of possession of land.

The suit was partly decreed in the Court of first instance. This decree was confirmed by the first appellate Court. On second appeal, the decree was confirmed by the following judgment of

Mullick J.—The plaintiffs as auction-purchasers of a revenue paying estate at a sale held under Act XI of 1859, sue the defendants for possession of certain lands which they have described by their cadastral survey plots. The defendants set up a lakheraj right to these lands alleging that they are the property of a shrine called the *Durga* of Hasrat Shahar Cherag Alim Saheb. The Munsiff found that the defendants had failed to prove any lakheraj right in village Latim Sahar and that in village Schangal they had proved their claim in respect of only 34 bighas.

1915.

April, 26.

The Subordinate Judge in appeal affirmed the findings of the Munsiff and dismissed the appeal.

Two grounds have been taken before me in second appeal: first, that the burden of proof was wrongly placed upon the defendants and second, that the Sanads on which the defendants relied have been wrongly construed. With regard to the second point I observe that it was not urged before the learned Subordinate Judge and even before me it is not shown in what respect the learned lower Court has erred. I do not therefore think that there is any substance in this point.

*Letters Patent Appeal No. 76 of 1915 in Appeal from Appellate Decree No. 1424 of 1911 against the decision of Mr. Justice B. K. Mullick, dated the 26th April, 1915, against the decree of R. K. Nag, Esq., Subordinate Judge, 2nd Court of Backergunge, dated the 23rd February, 1911, affirming that of Babu Sarat Chandra Sen, Munsiff 1st Court at Barisal, dated the 11th March, 1910.

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Mullick, J.

With regard to the question of onus I agree with the learned vakil for the appellants that the burden of proof was upon the plaintiffs. The cases of *Arfunnessa v. Peary Mohun* (1) and *Koylash-bashiny v. Gocoolmoni* (2), are authorities for the proposition that an auction-purchaser at a revenue sale suing for possession under section 37 Act XI of 1859, is in substance a plaintiff in a resumption suit and is bound by the rule laid down by the Privy Council in *Hurryhur Mookhopadhy v. Madub Chunder Baboo* (3). The cases which lay down that in respect of *mal* lands the person setting up an under-tenure as against the auction-purchaser has to prove such under-tenure, do not apply to lakheraj claims, for there is no presumption that every inch of land within the ambit of an auction-purchaser's estate was at the time of the permanent settlement assessed with revenue. I think therefore that the learned Munsiff has wrongly framed issue No. 7 which runs as follows :

"Have the contending defendants and their co-sharers their alleged Cheragi rights to the lands in suit or any portion of them? If so, are the plaintiffs entitled to annul it?" But it appears that the defendants accepted the issue in this form and went to trial upon it and took upon themselves the burden of proving their lakheraj rights. Further they made no complaint on this ground before the learned Subordinate Judge, and I must decline in second appeal to set aside the decree especially as the Courts below have come to a decision after a consideration of the evidence adduced by both sides. There may be some difficulty in executing the decree, but nothing has been said to me about that and I will merely direct that the appeal be dismissed with costs.

Against this decision, the defendants preferred an appeal under clause 15 of the Letters Patent.

Babu Abinas Chunder Guha for the Appellants.

Babu Joges Chunder Roy for the Respondents.

The judgment of the Court was delivered by

July 4.

Mookerjee, J.—This is an appeal, under clause 15 of the Letters Patent, from a judgment of Mr. Justice Mullick, in a suit for recovery of possession of land, upon declaration of title by purchase of an entire estate sold for arrears of revenue. The case for the plaintiffs is that on the 25th March 1897, they purchased the estate at a sale for arrears of revenue, and that the disputed lands, though comprised therein have been wrongfully retained by the defendants.

(1) (1876) I. L. R. 1 Calc. 378.

(2) (1881) I. L. R. 8 Calc. 230.

(3) (1871) 14 M. I. A. 152.

The contending defendants disclaim title and possession in a large number of parcels set out in the ninth paragraph of their written statement filed on the 10th February 1909; the other plots, they alleged, never constituted the *mal* lands of the estate purchased by the plaintiffs. They assert, on the other hand, that they have been in possession of those lands under a revenue-free grant made in the year 1731. The suit was decreed in the Court of first instance, in respect of all lands other than 34 bighas, in which, it was held, the defendants had established their revenue-free title. The Court, however, found it impossible to locate the exact situation of these 34 bighas and directed that the question be determined in the execution department. The Subordinate Judge confirmed this decree and added that he could not find fault with the lower Court for leaving the question about the site of those 34 bighas undetermined till the execution of the decree, when each party would have the right to represent his case. The decree of the Subordinate Judge has been confirmed on appeal by Mr. Justice Mullick.

On the present appeal, the defendants have contended that the burden lay upon the plaintiffs to establish that the lands in dispute constituted the *mal* lands of the estate purchased by them, that there is no evidence in the record to show that the plaintiffs had discharged the burden which lay upon them, and, that, consequently, the suit should have been dismissed. In support of this proposition, reference has been made to the decision of the Judicial Committee in *Hurryhur Mozkhopadhyaya v. Mudub Chander Baboo* (1), which was applied in the cases of *Arfunnessa v. Peary Mohun Mookerjee* (2) and *Koylash-bashiny Dossee v. Gocoo'moni Dossee* (3), to reach the conclusion that in resumption suits, the zemindar must prove the *mal* character of the lands claimed by him. It is not necessary for our present purpose to enter into a discussion of the abstract question of onus of proof in suits for resumption of revenue-free lands. It is sufficient to observe that in the present instance the lands are described in the record of rights as revenue-free lands. The burden consequently, lies primarily upon the plaintiffs to establish that the entry in the record of rights is erroneous, the question thus arises, whether the plaintiffs have adduced evidence to show that the disputed lands are *mal* lands of the estate purchased by them. It is conceded that there is no evidence in the record to show that rent had ever been claimed or realised by the proprietor of the estate in respect of the lands now on controversy. On the other hand, the defendants have produced a grant of 1731

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(1) (1871) 14 M. I. A. 152; 8 B. L. R. 566.

(2) (1876) I. L. R. 1 Calc. 378.

(3) (1881) I. L. R. 8 Calc. 230.

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which shows that an area of 64 bighas was granted to their predecessors to enable them "to burn lamps at the Durga of Shah Amirullah;" 34 bighas are said to have been situated in Kismat Sahangal; but as the document is in a tattered condition, it is impossible to state at this distance of time where the remaining 29 bighas were situated. The plaintiffs, it may be observed, claim in this suit lands situated in two villages, namely, Sahangal and Latinishar, and the case for the defendants was that the lands in their possession were situated in those two villages and were held by them revenue-free. In these circumstances, it is plain that there was a grant of 63 bighas of land a portion whereof, at any rate, was situated in village Sahangal. It is also clear that this grant was anterior not merely to the Permanent Settlement but to the grant of the Dewany, on the 12th August 1765. There is, on the other hand, no evidence to show that the plaintiffs or any previous proprietor ever claimed or realised rent in respect of these lands. In these circumstances it is difficult to appreciate how the plaintiffs can possibly succeed. They are no doubt entitled to the privileges of a purchaser of an entire estate at a sale for arrears of revenue. But what are those privileges? Concisely stated (omitting well-known qualifications), the rule is that the purchaser takes the estate as created at the time of the Permanent Settlement. The question, accordingly, reduced to this: Have the plaintiffs established that these lands were included in the estate at the time of the Permanent Settlement, in other words, was the revenue assessed on the basis of the assets of these lands? The answer must be in the negative. If there had been any indication that the rent had been realised in respect of these lands, that would have furnished evidence that the lands were impressed with a *mal* character. In the total absence of such evidence, it is impossible to say that merely because the lands are situated within the geographical limits of the estate purchased by the plaintiffs, they were *mal* lands and formed part of the zemindary at the time of the Permanent Settlement. We are clearly of opinion that the decree made by the Courts below cannot be sustained.

The result is that this appeal is allowed, and the decrees of the Courts below set aside, subject to the qualification presently to be stated. Our order will not affect the title of the plaintiffs to the parcels set out in the ninth paragraph of the written statement. The decree will declare the title of the plaintiffs to those plots and they will be placed in possession in execution of the decree of this Court. Subject to this reservation, the suit will stand dismissed with costs in all the Courts.

A. T. M.

. Appeal allowed.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir
Asutosh Mookerjee, Knight, Judge.*

AMJAD ALI HAZI AND OTHERS

v.

ISMAIL AND OTHERS.*

CIVIL.

1916.

May, 11.

Burden of proof—Fraudulent decree—Suspicious circumstances about fraud.

In a suit for declaration that a decree in a certain rent suit was fraudulent, the plaintiff is to prove that the rent decree was fraudulent and collusive. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition.

Wakelin v. London and South Western Railway Co. (1) followed.

Appeal by the Plaintiffs.

Suit for recovery of possession and for declaration that a certain rent decree was fraudulent. The primary Court decreed the suit, but this decree was reversed on appeal. Against that decree the plaintiffs preferred an appeal to the High Court. This decree was affirmed by the following judgment of

Beachcroft, J.—The plaintiffs brought the suit out of which this appeal arises for declaration of title and possession. They trace their title from one Daulat Gazi, being the heirs of Kamina, a deceased daughter of Daulat. Defendants Nos. 4 and 5 are sons and defendant No. 6 a daughter of Daulat. Defendant No. 1 is son and defendant No. 3 grandson of defendant No. 4 and defendant No. 2 is a son of defendant No. 6. Defendant No. 7 is the landlord.

Daulat died in 1893. Kamina died in 1906. Previous to her death Kamina had sued defendants Nos. 4 to 6 on the allegation that they had dispossessed her and got a decree in 1905. Subsequent to her death the plaintiffs got possession.

In August 1906 the landlord, defendant No. 7, got an *ex parte* rent decree against defendant No. 4 and in execution bought the holding and settled it with defendant No. 1.

The plaintiffs in the present suit alleged that Daulat was an occupancy raiyat and that the rent-decree obtained by the landlord was obtained by fraud. They claimed that their title was not affected.

* Letters Patent Appeal No. 103 of 1913, against the decision of Mr. Justice Beachcroft in Appeal from Appellate Decree No. 2500 of 1911, dated the 31st July, 1913, against the decree of A. H. Cuming Esq., District Judge of Tipperah, dated the 15th May, 1911, reversing that of Babu Ambica Charan Mojumdar, Munsiff, 6th Court at Comilla dated the 30th August, 1910.

(1) (1886) L. R. 12 App. Cas. 41 (45).

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The only defendants who put in written statements were defendants Nos. 1, 3 and 7. The joint written statement of the first two, so far as it is material to this appeal, alleged that the property never belonged to Daulat or Kamina, that defendant No. 4 alone was in possession of the holding, that the decree and execution proceedings were not fraudulent and that they took settlement from defendant No. 7.

Defendant No. 7 alleged that Daulat, Kamina and the plaintiffs never had any interest in the land, that the decree and execution proceedings were not fraudulent; that defendant No. 4 alone was in possession of the holding, that if any other persons had rights in the holding, the name of defendant No. 4 had been registered with their knowledge and consent, in fact he represented the owners of the holding, and that he himself had settled the holding after the execution purchase with defendants 1 and 3.

The Munsiff found that Daulat had an occupancy right in the holding and that the proceedings in the rent suit were fraudulent and collusive. He accordingly decreed the suit.

On appeal the District Judge found that Daulat was a non-occupancy raiyat, that he had no heritable interest in the holding, and consequently that plaintiffs had not made out any title. He also found that if Daulat had a heritable interest in the holding, defendant No. 4 represented the whole body of tenants in the holding at the time of the rent suit and that consequently if plaintiffs had had any interest in the holding it had passed by the execution sale. He accordingly dismissed the suit. He did not in terms come to any finding as to whether the proceedings in the rent suit were fraudulent.

The first point taken in this appeal is that the Judge ought not to have allowed the defendants to take up inconsistent positions, that in the first instance having denied that Daulat had any interest at all in the holding, they should not have been allowed to agree that his interest was not heritable. This really amounts to this proposition that the Court was bound to find that Daulat either had an occupancy right as alleged by plaintiffs or no right at all as alleged by defendants. It is obvious that such a proposition is not maintainable. I know of no principle of law which says that if the Court believes the truth to lie midway between the allegation of the parties it is not to find in accordance with its belief. The first Court having found that Daulat had an interest, it was open to the defendants to argue that at any rate it was wrong in finding that that interest was a heritable one.

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The learned District Judge has treated it as a settled proposition of law that a non-occupancy right is not heritable. On this point opinions are divided. That no doubt was the opinion expressed in the case of *Karim Chowkidar v. Sundar Bewa* (1), but of the three Judges who dealt with the question in the Full Bench case of *Lakhan Narain Das v. Jainath Panday* (2), two expressed a contrary view, one considered that non-occupancy rights were not heritable, and two held merely that the Bengal Tenancy Act had not affected those rights, without expressing any opinion whether they were heritable or not apart from the Tenancy Act.

Fortunately it is not necessary for me to express any opinion on this difficult question as I am of opinion that the second finding of the learned Judge concludes this appeal.

It is argued that the defendants ought not to have been allowed to set up any plea of representation as the position that defendant No. 4 represented the other heirs of Daulat could only arise if Daulat had heritable rights, a position inconsistent with the other plea that defendant No. 4 was the owner of the holding. and it is also argued that the theory of representation was an impossible one in view of the fact that plaintiff had been fighting defendants Nos. 4 to 6 shortly before the rent suit.

There is no substance in the first point. The landlord defendant alleged in his written statement that defendant No. 4 had been in possession of the holding over 12 years and he was not aware of any other person having an interest in it, but that if it turned out that others were interested they had treated defendant No. 4 as their representative. There is no reason why a defence should not be taken in this alternative form, and in fact Daulat had been dead for 13 years at the time of the rent suit.

The second point taken is a pure question of fact, and as such the finding of the learned Judge is conclusive whether it be a reasonable finding or not, and I may remark that as 12 years had elapsed between the death of Daulat and the litigation of 1905, it is not necessarily an unreasonable one. On that finding the interests of the plaintiffs if any in the holding would pass by the sale : *Jagat Tara Dassya v. Daulati Bewa* (3).

Finally it is objected that the learned Judge did not decide the question whether the rent suit was fraudulent or not. It is true that he does not find in express terms one way or the other. But reading that part of his judgment which deals with the question as a whole,

(1) (1896) I. L. R. 24 Calc. 207.

(2) (1907) I. L. R. 34 Calc. 516.

(3) (1909) 13 G. W. N. 1110 ; I. L. R. 37 Calc. 75.

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I think there can be no doubt that he meant to find that fraud was not proved. He states that the appellant (the present respondent) contended that it was not fraudulent, and that the holding passed by the sale. He then refers to the argument on behalf of the plaintiffs on the question of representation which was bound up with the question of the fraudulent nature of the proceedings, and he concludes by saying that the decree against defendant No 4 passed the rights of all the parties. By this he clearly intended to find that fraud was not established, for on a contrary view of the facts he must have found that nothing passed by the fraudulent execution sale.

In these circumstances the appeal fails and is dismissed with costs.

Against this decision, the plaintiffs preferred an appeal under section 15 of the Letters Patent.

Babu Birendra Chandra Das for the Appellants.

Babus Ram Charan Mitra and *Biraj Mohan Mojumdar* for the Respondents.

The judgments of the Court were as follows :

May, 11.

Sanderson, C. J.—I do not think we can interfere in this case.

It appears that the suit was brought for recovery of possession and for declaration that the decree in a certain rent suit was fraudulent.

The Court of first instance found that this decree was obtained fraudulently.

The learned District Judge in the first appellate Court gave judgment in which he impliedly decided that the decree in the rent suit was obtained by fraud.

On appeal to this Court Mr. Justice Beachcroft acted upon that supposition.

When the matter came in appeal under the Letters Patent to the Bench consisting of the late Chief Justice and Mr. Justice Nalini Ranjan Chatterjea, it was decided that the learned Judge of the first appellate Court ought to have come to a distinct finding on this all-important question whether the decree in the rent suit had been obtained by fraud.

Therefore, the matter was sent down to the District Judge for a finding upon that point. As has been already pointed out by my learned brother Mr. Justice Mookerjee the matter came before another District Judge, who investigated the matter and came to the

conclusion that the plaintiff had failed to prove that the rent decree was fraudulent or collusive. Now, an objection has been taken to that finding, and the learned vakil has drawn our attention to the ground upon which he asks us to reverse that decision.

As I understand the learned Judge's finding it is that the facts which have been proved before him are suspicious; that they are consistent with fraud; and on the other hand they are also consistent with there being no fraud: and, that being so, he has come to the conclusion that the plaintiff has failed to prove what he set out to prove.

In my opinion the principle which should be applied in such a case as this is laid down by Lord Halsbury in *Wakelin v. London and South Western Railway Co.* (1), where he says "that is the fact to be proved"—in the present case the fact to be proved by the plaintiff is that the rent decree was fraudulent and collusive. "If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; "*Ei qui affirmat non ei qui negat incumbit probatio.*"

I think the finding of the learned District Judge is one with which we cannot interfere; and, as it is admitted that if that finding stands the appeal must be dismissed, the consequence is that, in my judgment, this appeal should be dismissed with costs.

Mookerjee J.—I agree.

A. T. M.

Appeal dismissed.

(1) (1886) L. R. 12 App. Cas. 41 (45).

CIVIL RULE.

*Before Sir Asutosh Mookerjee, Knight Judge, and Mr.
Justice Beachcroft.*

CHARU CHANDRA BHATTACHARJEE AND ANOTHER

v.

KARAM BUX SIKDAR.*

Limitation—Interest, payment, of—Limitation Act (IX of 1908), Sec. 20—Interest paid as such.

*Civil Rule No. 468 of 1917, against a decision of Babu Lal Behary Chatterjee, Munsiff of Kalna, dated the 22nd April, 1917.

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In order to bring a case within section 20 of the Limitation Act, it is not essential that the debtor should, on the occasion of every payment, state explicitly that the payment is made on account of interest as such; it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest.

Application for revision by the Plaintiff.

Suit for recovery of money.

The material facts and arguments appear from the judgment.

Babu Kali Kinkar Chakrabutty (for *Babu Gopal Chander Chuckerbutty*) for the Petitioner.

Babu Bankim Chundra Mukerjee for the Opposite Party.

The judgment of the Court was delivered by

August, 13.

Mookerjee, J.—This Rule has been granted in connection with a suit for recovery of money due on a bond. On the 28th June 1911, the defendant borrowed from the plaintiffs a sum of Rs. 80 which was to carry interest at two per cent per mensem with annual rests. The bond provided that "whenever any sum might be paid by the debtor to the creditor, the debtor would get an entry made, on the back of the bond, of payment against the interest, and, after the interest had been satisfied, of payment against the principal to the extent of the surplus. On the 11th May 1912, the debtor paid Rs. 14. 6 as. and, an entry to this effect was made on the back of the bond. There were two similar payments subsequently, namely, Rs. 16 on the 2nd February 1914 and Rs. 80 on the 11th May 1915. This suit was instituted on the 2nd January 1917 for recovery of Rs. 55 as then due on the bond. The defendant pleaded that the claim had been satisfied in full, and, in the alternative, that if anything was due, the claim was barred by limitation. The Small Cause Court Judge has found against the defendant on the first point, and in his favour on the second point. The period of limitation applicable is three years under Art 67 of the first schedule to the Indian Limitation Act and the question in controversy is, whether, within three years antecedent to the institution of the suit, interest has been paid as such within the meaning of section 20 of the Indian Limitation Act.

Section 20 provides that where interest on a debt is, before the expiration of the prescribed period, paid *as such* by the person who is liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made. It is plain that some force must be attributed to the expression *as such*, and, that, consequently, something more than mere payment of interest must

be established to entitle the creditor to the benefit of section 20. The debtor has contended that there must be proof that, at the time the interest was paid, the debtor expressly stated that the payment was on account of interest, and that as, in the present case, the Small Cause Court Judge has found that nothing was said by either party when the payments were made, section 20 is of no avail to the creditor. In support of this view, reliance has been placed upon the decisions in *Hanmantmal Moti Chand v. Rambabai* (1), and *Muhammad Abdulla Khan v. Bank Insitment Co.* (2). These cases affirm the proposition that the meaning of the section is that there must be either an express intimation by the debtor, or proof of the existence of circumstances which show, that the payment was on account of interest on the debt sued upon; in other words, if payments are made in reduction of a general balance of account without intimation by the debtor that they are to be appropriated in satisfaction of interest, such payments are not payments of interest as such within the meaning of the section. This view is also supported by the observations in *Surju Prasad Singh v. Khwahish Ali* (3), and *Narrouji Bhimji v. Mugnirum Chandaji* (4). All the cases mentioned, are however, clearly distinguishable. In the case before us which in this respect differs from *Biswanath v. Someswar* (5), there was an express provision in the bond that whenever any payment should be made by the debtor to the creditor, the debtor would obtain an entry made on the back of the bond to the effect that the payment had been made on account of interest, and that it was only in the event of a payment exceeding the amount then due as interest that the surplus would be applied in reduction of the principal. If, now, we confine our attention to the payment made on the 2nd February 1916, we find that, at that time, a sum considerably in excess of Rs. 16 was due on account of interest. Consequently, pursuant to the agreement between the parties, the only payment which the debtor could make would be a payment as against the interest first. Though nothing was expressly stated by either of the parties at the time, the inference is irresistible that the payment of Rs. 16 on the 2nd February 1914 was a payment on account of interest as such. This view is supported by the observations in *Runchordas v. Pestonji* (6): "The section requires something more than the English law does, namely, that interest must be paid as interest; that is, it must be distinctly stated at the time of payment that it is paid on account of interest, or, *else there must be*

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(1) (1879) I. L. R. 3 Bom. 198.

(3) (1882) I. L. R. 4 All. 512.

(5) (1917) 21 C. W. N. 1055.

(2) (1909) I. L. R. 31 All. 495.

(4) (1880) I. L. R. 6 Bom. 103.

(6) (1907) 9 Bom. L. R. 1329 (1331).

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evidence from which the payment as interest may be distinctly inferred, and if so, the mere proof of payment is sufficient." To the same effect is the decision in *Gope Nath Singh v. Hardeo Singh* (1).

The principle applicable to cases of this character was lucidly stated by Blackburn, J. in *Morgan v. Rowlands* (2). The principle is that any such payment is an acknowledgment of the existing debt, from which is implied a promise to pay the residue or the principal as the case may be; the payment must, however, be such that from it the promise to pay can be inferred in fact and not merely implied in law; in other words, the payment must be of an unambiguous character. If the payment is of an ambiguous character and it is merely open to the creditor to make an appropriation according to his choice, the payment cannot be treated as a payment of interest as such. No doubt, a different view was indicated by Knight Bruce L. J. in the case of *Nash v. Hodgson* (3) in which he held apparently that where no appropriation is made by a debtor, the creditor has a right to make such an appropriation as will save limitation. The correctness of this view, however, has been doubted by Stirling L. J. in *Friend v. Young* (4). But whatever the law in England may be, the terms of section 20 of the Indian Limitation Act are, in our opinion, perfectly plain. We hold that, in order to bring a case within the section, it is not essential that the debtor should, on the occasion of every payment, state explicitly that the payment is made on account of interest as such; it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest; and the case before us is precisely of that description.

The result is that this Rule is made absolute, the decree of dismissal made by the Small Cause Court Judge set aside and the suit decreed with costs. The petitioners are also entitled to their costs of this Rule. We assess the hearing-fee at one gold mohur.

A. T. M.

Rule made absolute.

(1) (1909) I. L. R. 31 All. 285.

(2) (1872) L. R. 7 Q. B. 493.

(3) (1855) 6 DeG. M. and G. 474.

(4) (1897) 2 Ch. 421.

Before Sir Asyutosh Mookerjee, Knight, Judge, and Mr. Justice

Beachcroft.

NILKANTHA RAI

v.

GOSTO BEHARY CHATTERJEE.*

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August, 13.

Rateable distribution—Civil Procedure Code (Act V of 1908), section 73—Decree against same judgment-debtor—Sale by inferior Court.

Where the same property has been attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade, the sale should be held by the Court of superior grade. But where the sale has been held by Munsif, the Subordinate Judge is not to direct the Munsif to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred and the sale proceeds are then rateably distributed in accordance with the provisions of section 73 of the Code of Civil Procedure.

Application for revision.

The material facts and arguments appear from the judgment.

Dr. Dwarka Nath Mitter and *Babu Rishindra Nath Sarkar* for the Petitioner.

Babus Ram Charan Mitra and *Jyotis Chandra Sarkar* for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—This Rule raises a question of the relative rights of two rival decree-holders to participate in the sale proceeds of the property of their common judgment-debtor. The petitioner obtained a decree for money against his judgment-debtor in the Court of the Subordinate Judge on the 17th March, 1916. At his instance, writ of attachment was issued and served. A claimant appeared on the scene, but his objection was over-ruled. The claimant then sued for cancellation of the order and obtained an injunction restraining the petitioner from proceeding with execution of his decree till the suit had been decided. The Subordinate Judge thereupon stayed the sale and proceeded to dismiss the execution case. It appears to have been erroneously assumed that the effect of this order was, under rule 57 of order 21 of the Code, to cancel the attachment effected by the petitioner. The execution case was discontinued, not by reason of default on the part of the decree-holder, but at the instance of an unsuccessful claimant who had instituted a suit to contest the

August, 13.

* Civil Rule No. 502 of 1917, against an order of Babu Kaliprosunno Sen, Subordinate Judge of Burdwan, dated the 9th June, 1917.

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validity of the order in the claim case. In these circumstances, we must assume that the attachment effected at the instance of the petitioner is still in force. Meanwhile, proceedings had been taken by the opposite party, another creditor of the same judgment-debtor, for realization of his dues. The sale at his instance was fixed for the 20th April, 1917. The petitioner applied to the Subordinate Judge and prayed that he might communicate with the Munsiff with a view to get the sale stayed. The letter was sent, but reached the Munsiff after the sale had already been held in his Court. The petitioner then asked the Subordinate Judge to attach the sale-proceeds deposited in the Court of the Munsiff and to distribute them rateably. This application was dismissed. The petitioner now contends that the assets should be rateably distributed by the Subordinate Judge amongst all persons qualified under section 73 of the Code of Civil Procedure, inclusive of himself.

The petitioner is not entitled to rateable distribution under section 73, which provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, applied to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons. In this case, the petitioner did not apply for execution of his decree to the Court which held the assets. Indeed, he was not competent to make such an application, as the decree obtained by him in the Court of the Subordinate Judge could not possibly be executed by the Munsiff. Nor has he been able to obtain the benefit of the principle recognised in section 63, which provides that where property, not in the custody of any Court, is under attachment in execution of decrees of more Courts than one, the Court, which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof, shall be the Court of the highest grade or where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. If the petitioner had been able to apply in time to the Subordinate Judge under this section, the sale might have been held in his Court. That event, however, has not happened. The sale has actually been held by the Munsiff, and is a valid sale, as is clear from section 63(2), which provides that nothing in the section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

The position thus is that in the events which have happened, neither section 63 nor section 73 applies.

The question next requires consideration, whether, in the actual circumstances of the case, it is still possible for the Court to give relief to the petitioner. The Legislature undoubtedly contemplated that, where, as here, the same property has been attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade, the sale should be held by the Court of superior grade. Here, however, the Court of lower grade has actually held the sale in ignorance of the fact that proceedings in execution had already been taken in the Court of higher grade and that the property brought to sale was subject to a legally subsisting attachment effected in that Court. But the true intention of the Legislature may still be carried out in substance, if the course pointed out in *Bykant Nath Shaha v. Rajendro Narain Rai* (1), is adopted. There, the same property was sold in execution successively by a Munsiff and by a Subordinate Judge, and the question arose as to the validity of the title acquired by the subsequent purchaser. The Court observed that the Subordinate Judge, instead of holding a second sale, should rather have accepted the sale held by the Munsiff and have required a transfer of the deposit in his Court of the assets realized so that they might be rateably distributed amongst all the decree-holders. The same view was adopted in *Patel Naranji Morarji v. Haridas Nava'ram* (2) where Sir Charles Sargent C.J. observed, in similar circumstances, that the petitioner might have applied to the District Judge to transfer the proceeds realized by the sale held by the second class Subordinate Judge to the Court of the first class Subordinate Judge. If we compare the observations in the two cases just mentioned, it becomes obvious that Sir Charles Sargent pointed out the correct procedure to be followed in cases of this character; namely, the Subordinate Judge is not to direct the Munsiff to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred. If this procedure is adopted, full effect is given to the intention of the Legislature. The Subordinate Judge in essence adopts the sale held by the Munsiff as if it were a sale held by himself and the sale proceeds are then rateably distributed in accordance with the provisions of the Code. We feel no doubt that the Court has inherent power to adopt the procedure we have described to effectuate the ends of justice and that this course should have been followed in the present case.

(1) (1885) L. L. R. 12 Calc. 333 (338). (2) (1893) L. L. R. 18 Bom. 458.

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The result is that this Rule is made absolute, and the order of the Subordinate Judge set aside. We direct that the sale proceeds be transferred from the Court of the Munsiff to the Court of the Subordinate Judge to be rateably distributed by him amongst the decree-holders who have qualified themselves under section 73 of the Code of Civil Procedure including the present petitioner. We make no order as to the costs of this Rule.

A. T. M.

Rule made absolute.

APPELLATE CRIMINAL.

*Before Mr. Justice Teunon and Sir Syed Shamsul-Huda, Knight,
Judge.*

AMIRUDDIN AHMED *alias* TAKUR BAP

v.

KING EMPEROR.*

CRIMINAL.

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July, 19, 30.

Indian Evidence Act (I of 1872), sections 24, 25, 26, if qualified by section 27 of the Act—Information received from accused, admissibility of—Confession recorded by the Magistrate—Confession, verification of, by the Magistrate—Additional incriminating statements by the accused, during the verification, if admissible in evidence—Procedure of verification of confession by the Magistrate in the presence of the accused, propriety of—Charge to the jury, how to be expressed.

Section 24 of the Indian Evidence Act does not control section 27 of the Act. *Queen-Empress v. Babu Lal* (1) followed.

Under section 27 of the Act, if a single statement made by an accused person contains more information than what is contemplated in section 24, the statement is not to go in as a whole nor is to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery.

The Legal Remembrancer v. Chema Nashya (2) and *Queen-Empress v. Nana* (3) referred to.

A Magistrate after recording the confession of the accused in the regular manner took the accused with him to various places referred to in the confession for purposes of verification, and in the course of such verification the accused was said to have supplemented his former recorded confession by other statements of

* Criminal Appeal No 277 of 1917, against the conviction and sentence passed by D. P. Bagchi Esq, 2nd Additional Sessions Judge of Mymensingh, dated the 9th May, 1917.

(1) (1884) I. L. R. 6 All. 509. (2) (1897) I. L. R. 25 Calc. 413.

(3) (1889) I. L. R. R. 14 Bom. 260.

an incriminating nature ; and the Magistrate was allowed at the trial to depose to these other statements of the accused though they were never recorded at any time under section 164 of the Code of Criminal Procedure :

Held, that these additional statements could not be used as evidence against the accused.

Queen-Empress v. Bhairab Chander Chuckerbutty (1); *The Emperor v. Radhe Halwai* (2); *The King-Emperor v. Rajani Kanto Koer* (3) and *Queen-Empress v. Viram* (4) followed.

The propriety of the procedure of the verification of confession by the Magistrate himself in the presence of the accused discussed.

A Sessions Judge in his charge to the jury should avoid as far as may be the use of expressions which assume the guilt of the accused.

Criminal Appeal.

The accused was tried by jury in the Court of the Additional Sessions Judge of Mymensingh, and was convicted of dacoity and sentenced under section 395 I. P. C. to rigorous imprisonment for five years.

The other material facts will appear sufficiently from the judgment of Teunon J.

Babus Dasarathi Sanyal and *Jatindra Mohan Chaudhuri* for the Accused.

Mr. Orr (*Deputy Legal Remembrancer*) for the Crown.

C. A. V.

The following judgments were delivered :

T unon, J —In this case the appellant before us has been convicted of dacoity and sentenced under section 395, Indian Penal Code to rigorous imprisonment for five years.

The trial was by jury in the Court of the 2nd Additional Sessions Judge of Mymensingh and what has been urged before us is that the trial has been vitiated by the erroneous admission of evidence and by serious misdirections in the learned Judge's charges.

It appears that on the night of the 24th of November, 1916, at a village called Rajoi a serious dacoity took place in the houses of two cousins Rajendra and Debendra Bhoumik. From the house of Debendra, cash, currency notes, ornaments and other articles to an aggregate value of over Rs. 9,000 and from Rajendra's house cash and other property to the value of some Rs. 300 are said to have been removed.

(1) (1895) 2 C. W. N. 702.

(3) (1903) 8 C. W. N. 22.

(2) (1902) 7 C. W. N. 220

(4) (1886), I. L. R. 9 Mad. 224.

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Tolson, J.

In connection with this dacoity and with a dacoity that took place in village Baliapara about a month before, the appellant, it appears, came into touch with the police on the 26th of November. On the 28th of that month two persons of the name of Zahir and Piru, and on the 29th a 3rd man named Maniruddin were arrested. Thereafter also on the 29th, the appellant was himself arrested.

It is next said that all the four persons so arrested made confessions to certain police officers, and that the confessions so made led to certain discoveries.

On the following day, the 30th November, all four were produced before a Deputy Magistrate to whom appellant made a confession and Zahir and Piru made statements. On the 3rd of December, the Deputy Magistrate who recorded the statements next proceeded to verify the appellant's confession and in the course of these verification proceedings which continued to the 5th December, appellant, it is said, made additional statements.

Ultimately all four accused were placed on their trial, and all four have been convicted. We are however not concerned with Piru, Zahir and Maniruddin, whose cases are not before us.

I shall now deal with the objections that have been taken before us to the trial as conducted by the learned Judge.

The first objection or series of objections refers to the confession made by the appellant himself on the 30th of November. It is urged in the first place that the Sessions Judge has not sufficiently placed before the jury the circumstances which militate against the value of the confession such as (a) the interval between arrest and the making of the confession, in other words, the period spent in police custody, (b) facts indicating that the appellant had been led to believe that he would be made an approver, (c) the attempts made in portions of the confession to extenuate the appellant's own share in the crime and (d) the discrepancy between the sums or value stolen and the sums recovered. It has also been urged that the Judge should have excluded or directed the jury to discard from their consideration the first portion of the confession in which the appellant speaks of the earlier dacoity at Baliapara. In my judgment the Judge would have grievously erred had he excluded any portion of the confession, and the fact that he put the whole of the confession before the jury detracts from the argument that he did not invite special attention to passages in which for instance he speaks of persuasion or of his rescue of a child from spoliation. Similarly the learned Judge has in fact dealt with the question of inducement. Thus though it may be said with some reason that the Judge's treatment of the confession

is to some extent one-sided, for instance, in putting to the jury such questions as these, "is not the production..... material corroboration," ".....do they not afford sufficient corroboration" and in treating the use in the confession of English expressions, (which is merely consistent with evidence previously obtained), as having the value of independent corroboration, yet such misdirections as there are in this connection would not in my opinion have been sufficient by themselves to necessitate a retrial.

It is next urged that the Judge has erred in instructing the jury to take into consideration as against the appellant the statements made by Zahir and Piru to the Magistrate on the 30th of November. He has throughout spoken of these statements as "confessions" "confessional statements" or "confessions of a sort," but when we examine them we find that they are not self-incriminating statements. In speaking of them as confessions and in saying that they "should" be taken into consideration as against the appellant, the Judge, it is clear, must have misled the jury.

In the third place it is contended that the so-called verification proceedings are illegal and that no evidence regarding them should have been admitted. This contention is based largely on the observations to be found in the judgments in the case of *The Emperor v. Radhe Halwai* (1), but I do not understand that case or any other case to lay down that such proceedings are wholly illegal. They are undertaken, it would seem, with a view to testing the truth of a confession and to obtain evidence either corroborating the confession or indicating its falsity. In so far at least as such evidence may be obtained, for instance in ascertaining that the prisoner is familiar with, or wholly ignorant of, the localities of which he has spoken, or in furnishing clues to further enquiry such proceedings may be useful. In connection with such proceedings the main concern of the Courts would seem to be to ensure that evidence not strictly admissible is not admitted. In the present case that precaution has not been taken for we find that the verifying Magistrate has been permitted to speak to statements said to have been made to him in the course of his proceedings. Such additional statements being statements made in the course of an investigation when not recorded in the manner provided in section 164 of the Code of Criminal Procedure, are in my opinion, inadmissible. If further authority for this proposition is required it is to be found in the case of *Queen-Empress v. Bhairab Chunder Chakraborty* (2), (though I am not to be understood as agreeing in the distinction therein

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(1) (1902) 7 C. W. N. 220.

(2) (1893) 2 C. W. N. 702.

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drawn between a statement and a confession); *The Emperor v. Radhe Halwai* (1), and *The King-Emperor v. Rajani Kanto Koer* (2).

Lastly very serious objection has been properly taken to the manner in which the Sessions Judge has dealt with the confessions said to have been made by the appellant and the co-accused to the police in the course of the police investigation. It is unnecessary and it would be all but impossible to enumerate in detail the errors committed by the learned Judge in this connection. He has admitted in evidence and placed before the jury the whole history so to speak of the investigation. He has permitted the police officers and other witnesses, introducing *inter alia* much hearsay matter to describe the steps and processes by which they obtained and worked up clues and finally succeeded, in the Judge's language "in tracking and trapping the culprit" and finally in "bagging" the accused on their trial.

The confessions having led, it is said, to discoveries, he has next admitted in evidence not merely so much as led directly to the discovery or related directly to the fact discovered but practically the whole of each such statement, including such matter as this, "Maniruddin named one Amiruddin (*i.e.* the appellant), while Zahir did not...Maniruddin and Zahir were confronted, and Zahir when thus confronted had to admit that Amiruddin was also in the gang" and again, "Amiruddin asked to be confronted with Piru, Zahir and Maniruddin, to tell them to their faces what articles they each had got in their shares."

He has next in effect directed the jury that the statements which he has thus erroneously admitted could and should be used not merely against the maker but against his co-accused. In another respect also the Sessions Judge has dealt erroneously with this part of the case. He has expounded to the Jury the provisions of sections 24 to 30 of the Evidence Act and has next left it to the Jury to "scrutinize the confessions and the other evidence" in the light of that exposition. If in this portion of the charge he intended, as he apparently did, to leave it to the Jury to decide, whether the statements or confessions made to the Magistrate and how much of the confessions said to have been made to the police officers were admissible he has clearly thrown upon the Jury the duty which the law lays on him. It is for the Judge to admit or exclude evidence in accordance with the law on that subject, and for the jury to weigh and value the evidence admitted.

(1) (1902) 7 C. W. N. 220.

(2) (1903) 8 C. W. N. 22.

I have next to consider two criticisms which have been advanced in connection with this part of the case and do not appear to me to be well-founded.

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It is said that the Sessions Judge is wrong in his view that section 27 of the Evidence Act applies to and qualifies section 24 and section 25, as well as section 26,—whether as regards section 24, the question strictly arises has not been made clear, inasmuch as it has not been shown to us that discoveries resulted or are said to have resulted from confessions other than confessions made to police officers, or when in the custody of police officers and not in the immediate presence of a Magistrate. If however the question does arise, in that case I am of opinion that section 27 qualifies not only section 26, and section 25, but also section 24. All three sections lay down general rules excluding confessions. It is in my opinion unnecessary to discuss the policy which has led to the enactment of these rules. It is sufficient to say that the same broad grounds or principles appear to underlie all three. In section 27 follows an exception. The reason for making or providing this exception applies alike to each of the three preceding general rules. If the exception had been intended to apply only to section 26 or only to sections 26 and 25 we should have expected to find this intention expressly stated or to find the exception embodied in those two sections or in section 26 alone. Further the position of section 28 which is also in the nature of an exception to section 24 supports this view. I therefore hold that when a confession as a whole is excluded whether by reason of the provisions of section 26 or of section 25 or of section 24 so much of the information given by the person making the confession, when accused and in custody, as distinctly relates to a relevant fact thereby discovered becomes admissible.

It has next been contended that when an accused himself produces the articles said to be discovered any anterior statement made by him is inadmissible. I am unable to assent to this contention. On the contrary I agree with the view taken in *Queen-Empress v. Nana* (1), and in *The Legal Remembrancer, v. Chema Nashya* (2), that in such cases so much of the information as "set the police in motion and led to the discovery" is admissible. Even so, that does not in the present case render admissible evidence to the effect that when a certain pot had been fished out, Amiruddin, when pouring

(1) (1889) I. L. R. 14 Bom. 260.

(2) (1897) I. L. R. 25 Calc. 413.

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out the ornaments said "I got these ornaments in my share in the Rajoi dacoity." That statement obviously led to the discovery.

In conclusion I have to point out to the Additional Sessions Judge that in his charge to the Jury he should avoid as far as may be the use of expressions which assume the guilt of the accused. I have already had occasion to deprecate his use of the interrogative method, and more particularly his addressing to the Jury questions couched in the form. "Is *not* this" or "Does *not* that" and the like. Lastly I cannot condemn too strongly his use of slang or colloquial phrases such as "tracking, and trapping" or "bagging" culprits, more especially when applied to the persons then on their trial.

For the reasons given in our several judgments we agree that we have no alternative but to set aside the conviction and sentence in the present case and direct that the appellant be retried. The retrial will be in the Court of the Sessions Judge.

• **Shamsul-Huda, J.**—In this case three important questions of law have been argued before us. The first question is whether section 24 of the Evidence Act controls section 27 or is controlled by it, or in other words whether information given to a police officer by an accused person which may have led to a discovery within the meaning of section 27 can be used as evidence in case such information is proved to have been obtained by any inducement, threat, or promise, such as under section 24 would make a confession inadmissible. The question is *res integra* so far as this Court is concerned but there is an important decision of the Full Bench of the Allahabad High Court in *Queen-Empress v. Babu Lal* (1), in which the question whether section 27 controls section 25 of the Evidence Act was fully discussed and that decision has an important bearing on the decision of the present question. It was held by the majority of the Full Bench that section 27 controlled section 25, while the opposite view *vis.*, that it was a proviso to the next preceding section only was maintained in an equally exhaustive judgment by Mahmood J. The reasons given for and against the view that section 27 controls section 25 also app'y with equal force to the question whether that section likewise controls section 24. Although at first sight it may appear somewhat anomalous that an accused person should be prejudiced by a statement made by him even against his own will, for it infringes one of the fundamental principles of law that an act done by a person against his

(1) (1884) I. L. R. 6 All. 509.

own will is not his act, there is on the other hand the consideration that by whatever means obtained the statement receives a guarantee of its authenticity by the corroboration which the discovery lends to it. The considerations for and against the admissibility of such statement may be said to be equally balanced. If the policy of exclusion embodied in sections 25 and 26 is based on the unreliability of police officers deposing to incriminating statements made by accused persons, by reason of their being specially interested in the detection of crime and by reason of the corrupt practices that prevailed in those days, the danger is largely removed by the confirmation afforded by the 'discovery.' If on the other hand the exclusion is based on a desire to remove all temptations in the way of police officers to obtain confessions by inducement, threat or torture the 'discovery' does not remove the danger. That both these considerations had their share in determining the provisions of sections 25 and 26 cannot be doubted. The fact however that sections 25, 26 and 27 existed in the Code of Criminal Procedure uncontrolled by any express provision such as we now have in section 24 of the Evidence Act, may suggest the inference that by transferring those three sections from the Code of Criminal Procedure to the Evidence Act, no change in the law was intended to be introduced. But this argument is clearly fallacious as section 24 laid down no new principle but embodied a well-established principle regulating the admissibility of confessions and even before it was formally enacted as a rule of law in this country the principle governed these provisions of the Criminal Procedure Code even before their transfer to the Evidence Act of 1872. It appears however that the general principle derived from the English Law was even under that law modified, so as to negative its application to confessions leading to 'discovery' (1), I think therefore we ought to be guided by the decision of the majority of the Full Bench of the Allahabad High Court and hold that section 24 does not control section 27.

The next question for consideration is the extent to which information falling under section 27 can be given in evidence. The section itself is clear on that point and no discussion seems necessary. It lays down that only so much of such information whether it amounts to a confession or not as relates distinctly to the fact thereby discovered, may be proved. It is noticeable that the word used is not "*statement*" but "*information*" and this seems to suggest that even if a single statement contains more information than what is contemplated in section 24, the statement is not to go in as a whole

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(1) Taylor's Law of Evidence, section 824.

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nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery. If therefore an accused person were to state to a police officer that he killed *A* with a knife and concealed the dead body at a particular place all that is admissible is the information that he had concealed the dead body in that place but the further information that he himself had killed *A* is not admissible under section 27.

It was pointed out by Straight J. in the case of *Queen-Empress v. Babu Lal* (1), 'that where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding.' This question was fully discussed by a Full Bench of the Bombay High Court in *Queen-Empress v. Nana* (2). In the present case it is clear that the investigating police officer was allowed to disclose in his evidence a great deal more than is contemplated by section 27.

The last question for consideration is the propriety of the procedure adopted by the Deputy Magistrate Maulvi Abu Ali Chowdhury for the purpose of verifying the confession of the accused Amiruddin. It appears that after recording the confession of the accused in the regular manner this officer took the accused with him to various places referred to in the confession for purposes of verification, and in the course of such verification Amiruddin seems to have supplemented his former recorded confession by other statements of an incriminating nature, and the learned Deputy Magistrate was allowed at the trial to depose to these other statements of Amiruddin though they were never recorded at any time under section 164 of the Criminal Procedure Code. I am clearly of opinion that these additional statements could not be used as evidence against the accused. As authorities for this view I may refer to the decisions of this Court in *Queen-Empress v. Bhairab Chunder Chuckerbutty* (3), and *The King-Emperor v. Rajani Kanto Koer* (4), and of the Madras High Court in *Queen-Empress v. Viran* (5). Apart from the question of legality of the procedure, I think I would not be going out of my way if I expressed my concurrence with the views expressed by Prinsep and Geidt JJ. in the case of *The Emperor v. Radhe Halwai* (6), on the utility and the propriety of such a procedure.

It seems to me that such a procedure for purposes of verification confined as such verification must be to facts already stated in a

(1) (1884) I. L. R. 6 All. 509.

(2) (1889) I. L. R. 14 Bom. 260.

(3) (1898) 2 C. W. N. 703.

(4) (1903) 8 C. W. N. 22.

(5) (1886) I. L. R. 9 Mad. 224.

(6) (1902) 7 C. W. N. 220.

confession recorded in accordance with law would seldom require the presence of the accused. At any rate it was not required in the present case. The presence of the accused naturally leads to questioning, and to an effort to get out of him incriminating statements which under pressure of circumstances he finds himself compelled to make and as to which it cannot be said that it is voluntary. Even therefore if the Deputy Magistrate had in this case tried to make these statements admissible in evidence by recording them under section 164 of the Criminal Procedure Code after the verification had been completed, I would have found it difficult to hold that the confession was voluntary. I think 'verification' under conditions such as these leads itself to very great abuses and should be avoided. There is perhaps nothing objectionable in a verification made independently of the confessing accused and unaided by him. An accused person should not be placed in a position which *necessitates* his making incriminating statements and which leads to the creation of an evidence against himself. It is the privilege of an accused to say as little as he likes regarding the offences with which he is charged or to say nothing at all, if he is so minded, but it seems to me that the procedure adopted by the verifying officer is an infringement of the privilege. In this respect the police are in a position materially different from that of a Magistrate, for whereas, a statement made to a police officer unless it falls within the provision of section 27 of the Evidence Act, can never be used against an accused, a Magistrate may if he chooses record these statements in the manner required by law after the verification procedure is over, and thereby give such record an air of validity which in reality does not attach to it.

I think therefore that there was misdirection to the jury in so far as the learned Judge admitted as evidence confessional statements made to the police which were not strictly within the limits laid down by section 27 of the Evidence Act and also in so far as he allowed the Deputy Magistrate Mr. Abu Ali Chowdhury to depose to statements made by the accused in the course of the procedure adopted by him for verifying the confession of the accused—statements which were at no time recorded by him in accordance with the provisions of section 164 of the Criminal Procedure Code, and it is highly likely that the admission of such evidence not legally admissible has prejudiced the accused in the trial. For these and for other reasons given in the judgment of my learned brother I agree with him in directing a retrial.

A. N. R. C.

Conviction set aside: Retrial ordered.

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APPEAL FROM ORIGINAL CIVIL.

Before Sir John Woodroffe, Knight, Judge, and Sir Asutosh Mookerjee, Knight, Judge.

ROMENDRA NATH ROY

v.

BROJENDRA NATH DASS AND OTHERS.*

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Appeal—Letters Patent, clause (15)—Judgment—Misjoinder of parties and causes of action—suit, stay of—Civil Procedure Code (Act V of 1908) O. 1, Rr. 1, 3—Section, construction of.

An appeal lies under clause 15 of the Letters Patent, against an order which, in substance, decides a question of jurisdiction. When a Court refuses to proceed with the trial of a suit on the ground of misjoinder of parties and causes of action, the Court may be said to be "unable to entertain it" and the reason is of a "like nature" with defect of jurisdiction.

Where it was decided that there had been misjoinder of parties and causes of action, that the plaintiff could not be allowed to proceed in one suit against the defendants, and the hearing was adjourned for the plaintiff to elect against which of the defendants he would proceed, *held*, that the decision was a judgment affecting the merits of the question and determining some right or liability between the parties.

Rules 1 and 3 of order 1 of the Code of Civil Procedure apply to questions of joinder of parties as also of causes of action.

The determining factors applicable to the question whether a suit has been constituted in conformity with order 1 rule 3 of the Code of Civil Procedure, are, *first*, could the right to relief against the defendants be said to be *in respect of* or *arising out of* the same act or transaction, and, *secondly*, would any common question of law or fact arise, if separate suits were brought. The Code does not require that all the questions of law or fact which arise, should be common to all the parties.

Per Mookerjee, J. :—The true test to be applied in the solution of the question of the competence of the appeal against a determination that there has been a misjoinder of causes of action in the suit and the plaintiff cannot be allowed to proceed against the defendants as they at present stand on the record, is not the form of the adjudication but its real effect on the suit or proceeding in which it has been made.

The determination of the question whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action, depends upon the allegations made in the plaint.

In considering the construction of a section in an Indian Act, which is professedly based on an English enactment, which in fact reproduces almost word for word the language of the English enactment, the Judges are in practice, if not in theory, bound by the decisions of the English Court of Appeal.

* Appeal from Original Side No. 9 of 1917 in Suit No. 97 of 1914, against the decision of Mr. Justice Chitty, dated 5th February, 1917.

Lovelock and Lewes v. Malabar Timber and Saw Mills (1) referred to.

If one has a cause of action against A and B for a tort X, and quite a separate cause of action against B for tort Y, he cannot in one action unite claims in respect of both torts X and Y against A and B.

Appeal by the Plaintiff.

The material facts of the case will appear from the following judgment of

Chitty, J.—In this suit I heard arguments on the preliminary question, whether the suit is bad for multifariousness and took time to consider my judgment in order that I might again carefully peruse the pleadings and see exactly how the case stood. This suit was filed on 22nd January 1914 by the plaintiff, Romendra Nath Roy. He joined as parties defendants Brojendra Narayan Das (called in the plaint Brojendra Nath Das), Messrs. H. D. Cartwright & Co., the Lansdowne Jute Company, Messrs. Birkmyre Brothers, and the Bengal National Bank.

On 11th May 1915, Messrs. Birkmyre Brothers obtained an order from the Court adding the Delhi & London Bank as party defendant, the plaintiff having refused to make them parties and stating (as he still states) that he has no claim against that Bank. The gist of the plaintiff's claim is shortly this :—(On 21st December 1913 by three separate contracts he agreed to sell to Brojendra Narayan Das 1,750 bales of jute. Under the contracts Brojendra Narayan Das was liable to pay to the plaintiff 90 per cent of the purchase-money before he could get the bills of lading or railway receipt for the goods. The plaintiff's case is that just at the close of December 1913, Brojendra Narayan Das procured the bills of lading and railway receipt from him under false pretences, promising to pay, but failing so to do.) As a matter of fact the plaintiff admits that on 3rd January 1914 Brojendra Narayan Das gave him a cheque for Rs. 25,000, which was subsequently realised. On 7th January, he is stated to have given the plaintiff two cheques for sums aggregating Rs. 34,400, which were subsequently dishonoured. The plaintiff pleads that (on 29th December 1913 (I am told that it should be 30th) Brojendra Narayan Das made over the bills of lading and railway receipts to Messrs. Cartwright & Co., and in paragraph 12 the plaintiff distinctly alleges that in taking those bills of lading and railway receipts and in dealing with them as they did, Messrs. Cartwright & Co. did not act in good faith, and that the circumstances under which they dealt with them were such as to raise a reasonable presumption that Brojendra Narayan Das had no right either to

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the bills of lading and railway receipts or to sell the goods covered by them. The plaint goes on to allege that Messrs. Cartwright & Co. purported to sell the goods, some to the Lansdowne Jute Company and some to the Hastings Jute Mill owned by Messrs. Birkmyre Brothers. He further alleges that one railway receipt No. 9 came into the hands of the Bengal National Bank. The plaintiff accordingly prays (1) for a declaration that he is entitled to the bills of lading and railway receipts and to the goods covered thereby, (2) that the defendants and each of them may be directed to return to the plaintiff the said bills of lading and railway receipts of the goods, of which they or any of them have already taken delivery and (3) that in the alternative Brojendra Narayan Das and Cartwright & Co. may be directed to pay to the plaintiff Rs. 64,519-4-0 as damages; that the defendants, the Lansdowne Jute Company might be directed to pay Rs. 33,330, Messrs. Birkmyre Brothers Rs. 29,093-12 and the Bengal National Bank Rs. 2,095-8 as damages. These damages are claimed against all these defendants on the ground of wrongful conversion. It may here be noted that the plaintiff in his claim for damages has omitted to give credit for the Rs. 25,000 realised as above stated.

It was objected at the commencement of the hearing, when the issues were framed, that there was a misjoinder of causes of action in this suit. The issue was actually raised by the Bengal National Bank, but it has been adopted by the Lansdowne Jute Company and Messrs. Birkmyre Brothers. I understand that Messrs. Cartwright & Co. also adopt it, but it does not affect them in the same way as it affects the other defendants. Brojendra Narayan Das filed a written statement but has not appeared in the suit.

I was careful to ask the learned counsel for the plaintiff, what his claim really was, and I understood him to say that it was a suit for conversion, that is to say a suit based entirely on tort. That is how I read the plaint, and it is the only way, I think, in which the plaint can be read. This morning before I commenced to deliver judgment Mr. S. R. Das stated that he had omitted to argue the question of the stoppage in transit and its effect on the rights of the parties. He now suggests that clause (a) of the prayer of the plaint or clause (f), the general prayer for further or other relief, may include a prayer for relief against the several defendants based on contract, and resulting from the plaintiff's action in stopping the goods or some of them in transit. It is perfectly true that there is a statement as to stoppage in transit to be found in paragraph 10 of the plaint, but it is an isolated statement, and has no apparent relation to the

rest of the plaint as framed. No further reference is made to it and no relief can be said to be claimed in the prayer of the plaint, as it at present stands based upon that cause of action. It was further suggested that the plaint might be amended to remedy any defect in this connection, but obviously I cannot permit that now. It would be to alter the claim by adding one of an inconsistent character.

As I read the plaint it is simply a claim for the return of the bills of lading and railway receipts or the goods represented by those documents, and, in the alternative, for damages for the wrongful conversion of those goods. The allegation is that on 30th December, Brojendra Narayan Das and Messrs. Cartwright & Co. joined in converting these goods to the use of the latter. Allegations of subsequent conversion as to portions of the goods are made against the Lansdowne Jute Company; as to other portions against Messrs. Birkmyre Brothers; and as to the one railway receipt No. 9, against the Bengal National Bank.

An elaborate discussion took place on the law as to misjoinder of causes of action, and a number of cases were cited. I do not propose to discuss those cases here. As I understand the law with regard to actions in tort, if it is a case of one wrong committed by joint wrong-doers, then they may be properly joined as defendants in the same action. If it is a case of separate wrongs committed by separate persons at separate times, then they cannot be so joined. This case appears to me to fall under the second category. In Messrs. Clerk and Lindsell's work on Torts they define joint tortfeasors in the following words:—

"Persons are said to be joint tort-feasors when their respective shares in the commission of the tort are done in furtherance of a common design." Here, so far as the defendants, the Lansdowne Jute Co., Messrs. Birkmyre Brothers and the Bengal National Bank are concerned, it is not suggested that they had any common design with Brojendra Narayan Das, or Messrs. Cartwright and Co. On the other hand it is suggested and stated, that there was a common design between Brojendra Narayan Das and Cartwright and Co.

An attempt was made here, as has been often made in England, but unsuccessfully, to get out of the provisions of order 2, rule 3 by harking back to order 1, rule 3. I do not think that that can be allowed. Order 2, rule 3 provides for a plaintiff uniting in the same suit several causes of action against the same defendant, or the same defendants jointly, but it does not provide for joining several

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different causes of action against different defendants who are severally liable on those causes of action. It was said that in this case the evidence would proceed very much on the same lines and would be much the same in a suit against any or all of these defendants.

That is true up to a point, because the torts alleged are said to have been committed in respect of the same goods or portions of them. Obviously, therefore, in tracing the events which led up to the alleged conversion by the Lansdowne Jute Co. it would have to be proved as to how the goods came to them. The same would be the case with Messrs Birkmyre Brothers and the Bengal National Bank. That, however, would only be up to a point. The separate acts of conversion on the part of these several defendants would be entirely irrelevant in a suit against the others of them.

After giving this matter my best consideration I am of opinion that there has been a misjoinder of causes of action in this case, and that the plaintiff cannot be allowed to proceed in the one suit against the defendants as they at present stand upon the record. I cannot give effect to Mr. Das's suggestion, which he made to-day that the suit should go on against them all, as if it were a suit on contract, the plaintiff's claim being taken to be based on his right of stoppage in transit. That does not appear to me to be the true nature of the plaintiff's case as framed. Probably with regard to Brojendra Narayan Das and Cartwright and Co., no difficulty will occur. The suit is properly framed against them on the statements in the plaint, and it may be allowed to continue but it appears to me that the other three defendants, the Lansdowne Jute Company Messrs Birkmyre Brothers and the Bengal National Bank, are alleged to have committed different torts in respect of portions of these goods at different times, both as regards each other and as regards Messrs Cartwright and Co. I think, therefore, that any claim that is made against them ought to be preferred in separate suits against those defendants.

With regard to the Delhi and London Bank, the position is again different. They were brought on the record at the instance of Messrs. Birkmyre Brothers; why that was done, if Birkmyre Bros. intended to rely on the issue as to misjoinder of causes of action, I am at a loss to conceive. They are clearly not necessary or proper parties to the suit, as I take it to be framed. No allegation is made against them by the plaintiff and no relief is claimed.

I give the plaintiff a fortnight's time to elect, how he will proceed with the suit, and which of the defendants he will retain upon the record. At present I make no order as to costs.

The suit will be put down this day fortnight to be mentioned.

Against this order, the plaintiff preferred an appeal.

Mr. B. C. Mitter, Offg. Advocate-General (with him *Messrs. S. R. Das* and *K. P. Basu*) for the Appellant.

Mr. B. L. Mitter for the Respondents, The Bengal National Bank.

Mr. C. C. Ghose (with him *Mr. D. C. Ghose*) for the Respondent Birkmyre Bros.

Mr. Buckland (with him *Mr. Surita*) for the Respondent Lansdowne Jute Mills.

Mr. Langford James (with him *Mr. N. Sircar*) for the Respondents Cartright & Co.

The judgments of the Court were as follows :

Woodroffe, J—This suit is brought against four sets of defendants and the point in issue is, whether there has been misjoinder of parties and causes of action. In the judgment under appeal Chitty J. has held that the plaintiff who claims such right cannot be allowed to proceed in one suit against the defendants, and adjourning the hearing, gave the plaintiff a fortnight to elect against which of the defendants he would proceed. Though the learned Judge does not expressly say so, it is quite clear on the judgment and proceedings that if the plaintiff does not elect and persists in his claim to sue all defendants, his suit will be dismissed. The position is substantially the same as if the Court had dismissed the action unless the plaintiff elected under the liberty given to him. It has been objected that no appeal lies. The first question is, whether this is a judgment. It seems to be that it is, for it is an adjudication that the suit cannot lie as framed and cannot proceed as presented and that the Court cannot hear it. Such adjudication was based on the view that the suit is bad for misjoinder of causes of action and parties. The Court is said to be unable to entertain the suit, the reason being of a like nature with defect of jurisdiction and not a mere irregularity. A decision to this effect which will be followed by dismissal unless the plaintiff abandons rights to which under the law he claims to be entitled, is, in my opinion, a judgment affecting the merits of the question and determining some right or liability between the parties. It has not been contested that if there were a final order having this effect, it would be a judgment. The argument is that there is no such order, that all the Court has done is to adjourn the suit, that it has not directed an election or dismissed the suit, and that, therefore, the appeal is premature.

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We must look at the substance of the matter. The order giving the plaintiff liberty to elect, a liberty he did not desire and an order which he opposes, is nothing but an adjudication that he cannot proceed on the plaint as framed, and such an adjudication necessarily implies the result which follows on persisting with such a suit—namely dismissal. The judgment makes clear why the plaintiff was called upon to elect. There appears to me to be in substance a decision that the suit will not lie as framed with the result that if the plaintiff insists on his alleged rights, the suit will be dismissed. I am of opinion that on these facts an appeal will lie.

On the merits the question is this. The frame of the suit is admittedly not supported by order 2, rule 3. It is then said that it is justified by order 1, rule 3. To this it is replied firstly that this last rule deals with parties and not joinder of causes of action, and in the alternative and on the supposition that it does deal with joinder of causes of action, the present case does not on the facts fall within the rule. Order 1 is headed "Parties" and order 2 "Frame of suit." The question of parties involves that of cause of action and *vice versa*. A person is made a party because there is a cause of action against him; and where causes of action are joined, parties are joined. In a perfectly framed Code which dealt in separate chapters with parties and causes of action, the provisions should be exactly parallel, looking at the same matter from its different aspects in a way according to which the provisions of one order would be in conformity with the provisions of the other. So much may be conceded, and if the solution of the question were doubtful, one might have hesitated on this ground to hold that a suit might be framed under Order 1 in a manner not provided for by order 2, which, according to its heading, specifically deals with the frame of a suit. But in the present case we have to deal with the wording of a rule, the meaning of which has been construed. There are decisions of the English Courts on rules from which our own are taken. These decisions are subsequent to the year 1896 when order 16 rule 1 was amended. It has been held that that order deals not only with joinder of parties but also joinder of causes of action, notwithstanding that Order 16 like Order 1 is headed "parties" only: *Compania Sansinena v. Houlder* (1); *Bullock v. London General Omnibus Co.* (2); *Markt & Co. v. Knights Bridge Steamship Co.* (3); *Times Cold Storage Co. v. Lowther* (4).

This, notwithstanding incidental observations to a contrary

(1) (1910) 2 K. B. 354.

(2) (1907) 1 K. B. 264 (271, 272).

(3) (1910) 2 K. B. 1021 (1036).

(4) (1911) 2 K. B. 100, (107).

effect in *Thompson v. London County Council* (1), is not disputed before us. The decisions in the Bombay High Court given in 1908 and referred to in *Jankibai v. Srinivas* (2), do not refer to the latest English decisions. It is conceded before us that it cannot be now contended that order 16 from which order 1 is taken, does not refer to joinder of causes of action. These decisions were on order 16 rule 1 corresponding to order 1 rule 1 but are equally applicable to order 1, rule 3, which is in exactly the same terms as order 1, rule 1, substituting the word "defendant" for "plaintiff". Indeed, in England where the rule relating to the joinder of defendants is in differing terms, from that relating to joinder of plaintiffs it has been held that they should be interpreted on similar principles. It must be held then that order 1, rule 3 does refer to joinder of causes of action. The next question then is whether the joinder in the present case is justified by that rule. It is contended that it is not, it being argued that there are different sets of transactions and no common question of law or fact. The foundation of the case, on which the rest of it depends, is the alleged fraud of B. N. Das. If such fraud is proved the question is, did the defendants who all claim under B. N. Das obtain any title? If the plaintiff fails to prove fraud on the part of B. N. Das, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence; but that does not make the case any the less one of a common question of law and fact. The same act or transaction which concerns all parties is the alleged fraud of B. N. Das, and this involves a common question of law or fact. All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud. By reason of this the possession of all is alleged to be wrongful.) Whether a common question arises may be tested by seeing what the evidence will be. In the shorthand notes, Chitty J. expressed the opinion that the evidence will be common, and that if there were separate suits, they might be heard together with consent. In the judgment the learned Judge qualified this statement by saying that this was true up to a point. It is true so far as the plaintiff's cause of action, as based on the fraud of B. N. Das, is concerned, though there may be some facts which are particular to particular parties being offered in proof of the plaintiff's case (e.g. present possession of the goods as a result of such fraud) or by the defendants as part of their defence. The rule does not say that all questions must be common. It is sufficient that there is a common question. In my opinion then, the plaint is

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(1) (1899) 1 Q. B. 842.

(2) (1913) 1 L. R. 38 Bom. 120.

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within the provisions of order 1, rule 3. It may be conceded that the case of the Bengal National Bank raises points which do not affect other defendants. For the Bank is not concerned with the transactions with Cartwright and Co. or the two Mills which claim through them. Goods covered by Railway receipt No. 9 have not been stopped in transit, having been already delivered to Lansdowne Mill. The plaint asks for declaration that the plaintiff is entitled to the document (Railway receipt No. 9) and to the goods covered thereby which are said now to be with the Lansdowne Mill. The Bank claims to deal with the goods if it can do so. The common root of title is B. N. Das.

I am of opinion, therefore, that the suit is not bad for misjoinder of parties and causes of action. Should it, however, be convenient, the Court may [*Uma Bai v. Vithal* (1)] direct the successive trial of the issues separately affecting different defendants. Thus the question of the alleged fraud of B. N. Das touching all the defendants may be tried first. If it fails, there is an end of the case. If it succeeds and the Bengal National Bank does not wish to be present at the trial of the issues, so far as they affect the other defendants, *viz.*, Cartwright & Co., and those claiming through them, there is no reason why it should attend. I would, therefore, decree this appeal with costs.

Mookerjee, J.—This appeal is directed against a determination by Mr. Justice Chitty that there has been a misjoinder of causes of action in this suit and that the plaintiff cannot be allowed to proceed against the defendants as they at present stand on the record. A preliminary objection has been taken to the competence of the appeal on the ground that this decision does not constitute a "judgment" within the meaning of clause 15 of the Letters Patent. Stress has been laid on the circumstance that the order as drawn up merely adjourns the suit to a specified date with liberty to the plaintiff to elect meanwhile as against which of the defendants he will prosecute the suit, and does not specifically state, as the order of Channell, J. did, in the case of *Frankenberg v. Great Horseless Carriage Co.* (2), that, on his failure so to elect, the suit will be dismissed. In my opinion, there is no substance in the preliminary objection.

It is plain that the true test to be applied in the solution of the question of the competence of the appeal is, not the form of the adjudication but its real effect on the suit or proceeding in which it has been made. Whatever the form of the adjudication may be,

(1) (1908) I. L. R. 33 Bom. 293 (306).

(2) (1904) 1 Q. B. 504.

there is no doubt that it does, in the present instance, put an end to the suit, so far as the trial Court is concerned; from this standpoint, the adjudication may properly be deemed a judgment, not merely within the test formulated by White C. J., in *Tuljaram v. Alagappa* (1), but also within the definition given by Couch, C. J. in *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* (2): "Judgment in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability." That this does not necessarily involve an actual decision on the right in controversy between the parties is clear from one of the illustrations given by Couch, C. J. himself. He pointed out the obvious difference between an order for the admission of a plaint and an order for its rejection, and added the observation that "the former determines nothing, but is merely the first step towards putting the case in a shape for determination; the latter determines finally, so far as the Court which makes the order is concerned, that the suit as brought will not lie; the decision therefore is a judgment in the proper sense of the term." The same view is confirmed by the decision of Couch, C. J. in *Hadjee Ismail v. Hadjee Mahomed* (3), where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under clause 12 of the Letters Patent. The order, he said, was of great importance to the parties, was not a mere formal order or an order merely regulating the procedure in the suit, but one that had the effect of giving a jurisdiction to the Court which it otherwise would not have; it might fairly be said to determine *some right between the parties, namely, the right to sue in a particular Court*. To the same effect is the decision of the Judicial Committee in *Hurrish Chunder v. Kali Sundary* (4), that an appeal lies against an order which, in substance, decides a question of jurisdiction. Now, when a Court refuses to proceed with the trial of a suit on the ground of misjoinder of parties and causes of action, the Court may fairly be said, in the words of Beverley and Jenkins, JJ. in *Mullick Kefait Hossein v. Sheo Pershad* (5), to be unable to entertain it and the reason is of a like nature with defect of jurisdiction. As pointed out by Lord Herschell and Lord Russell in *Smurthwaite v. Hannay* (6), and by Lord Halsbury in *Subramaniya v. King Emperor* (7), an objection that a suit is multifarious is really an objection that the suit has been constituted, as to joinder of

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(1) (1910) I. L. R. 35 Mad. 1.

(2) (1872) 8 B. L. R. 433.

(3) (1874) 13 B. L. R. 91.

(4) (1882) I. L. R. 9 Calc. 482; L. R. 10 I. A. 4.

(5) (1896) I. L. R. 23 Calc. 821.

(6) (1894) App. Cas. 491.

(7) (1901) L. R. 28 I. A. 257; I. L. R. 25 Mad. 61.

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parties and causes of action, in a way not authorised by the law and the rules applicable to procedure. The decision that a suit is so constituted and cannot be entertained as framed is, in my opinion, a judgment within the meaning of the Letters Patent. It may further be usefully borne in mind that, as was pointed out in *Mathura Sundari v. Haran Chandra* (1), and *Budhu Lal v. Chattu Gope* (2), the various definitions or elucidations of the term "judgment" to be found in a variety of cases in the reports are not statutory definitions, and, while they furnish useful tests, they cannot be deemed inflexible and exhaustive. In the present case, if we look at the nature and the contents of the order there is no escape from the conclusion that it would be idle to hold that the plaintiff should refuse to elect, should get his suit dismissed, and, then, prefer an appeal against the decree of dismissal as he would be unquestionably entitled to do. I am not disposed to place a narrow construction upon the term "judgment" and thereby to postpone the inevitable determination, by the Court of appeal, of the controversy as to the constitution of the suit. The preliminary objection must consequently, be overruled.

The determination of the question whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action depends upon the allegations made in the plaint. The suit is framed in the alternative for the recovery of goods and documents of title relating thereto or of the value of the goods. The plaintiff asserts that the bails of jute in controversy were his property and that Brajendranath Das by means of fraud obtained possession thereof with the documents of title. The plaintiff further asserts that the goods have subsequently passed into the possession of the Landsdown Jute Mills and the Hastings Jute Mills through Cartwright & Co. to whom they were transferred by Brajendranath Das. The plaintiff next alleges that one of the documents of title, namely, a railway receipt has passed from Brajendranath Das to the Bengal National Bank, though the goods covered thereby are in the possession of the Landsdowne Jute Mills. On these allegations, the plaintiff joined as defendants Brajendranath Das, Cartwright & Co., the Landsdowne Jute Mills, the Hastings Jute Mills and the Bengal National Bank. The relief he seeks is the recovery of the goods and the documents of title, or, in the alternative, the value of the goods. As regards the alternative claim, he seeks a decree for the entire sum against Brajendranath Das and Cartwright & Co., or proportionate sums

(1) (1915) I L. R. 43 Calc. 857.

(2) (1916) 22 C. L. J. 193.

against the other three defendants according to the value of the goods and documents in the possession of each of them. Before the trial of the suit, the Delhi and London Bank were added as defendants on the application of the Hastings Jute Mills, on the ground that they were interested in the subject matter of the litigation. Mr. Justice Chitty has held that the suit cannot proceed on the plaint as framed, because not framed in conformity with order 2, rule 3 of the Civil Procedure Code, 1908. He has further held that the plaintiff could not successfully claim the benefit of order 1 rule 3. His view in substance is that order 1 rule 3 is limited to joinder of parties and has no application to questions of joinder of causes of action, which must be deemed to be governed exclusively by order 2 rule 3. For the solution of this, the fundamental question in this appeal, it is necessary to examine the provisions of orders 1 and 2.

Order 1 relates to parties to suits. Order 2 relates to frame of suits. Consequently, at first sight, it might seem as if the two orders related to two distinct topics. Such a view, however, would obviously be based upon an unsubstantial distinction, because when a plaintiff frames his suit, he joins parties as defendants ordinarily because he claims to have a cause of action against them; in other words, when the legislator has to frame rules for joinder of parties and joinder of causes of action, he examines, on the two occasions, the same problem though from different standpoints. Accordingly, in a Code which is ideally arranged with due regard to logic and symmetry, one would expect to find in the chapter on joinder of causes of action provisions which accurately correspond to similar provisions in the chapter on joinder of parties. Codes, however, are rarely, if ever, accurately logical and symmetrical. It would, consequently, be unsafe to assume that because a particular rule finds a place in Order 1, which treats of parties to suits, it can have no bearing on questions of misjoinder of causes of action; it is manifestly necessary that some regard at any rate must be paid to the history of the legislation on the subject. *Ishuree Prosad v. Chatterpat* (1); *Brown v. McLachlan* (2); *Kripasindhu v. Ananda Sundari* (3). Now it is well-known that order 1, rule 1 is a reproduction of order 16, rule 1 of the rules of the Supreme Court in England while order 1, rule 3 which corresponds to R. S. C. order 16 rule 4 is yet substantially different in phraseology therefrom. Order 2, rule 3 again corresponds to R. S. C. order 18, rule 1, but differs

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(1) (1842) 3 M. I. A. 100 (130). (2) (1872) L. R. 4 P. C. 543 (550).

(3) (1907) 6 C. L. J. 273 (293).

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therefrom in an important respect. Thus as order 1 rule 1, which provides for the joinder of plaintiffs is identical with R. S. C. order 16, rule 1, it is consonant to well-established principles¹ of statutory interpretation that we should determine the exact scope of the rule in our Code in the light of the decisions in the superior Courts in England which have explained the true construction of R. S. C. order 16, rule 1. As White, C. J. observed in *Lovelock & Lewis v Malabar Timber & Saw Mills* (1), in considering the construction of a section in an Indian Act which is professedly based on an English enactment, which in fact reproduces almost word for word the language of the English enactment, we are in practice, if not in theory, bound by the decisions of the English Court of appeal. Now it is well-known that the English rule, as it now stands, was introduced on the 26th October, 1896 to meet the difficulty created by the decision of the House of Lords in *Smurthwaite v. Hannay* (2), to the effect that the rule as it previously stood did not relate to joinder of causes of action, but applied only to joinder of parties in respect of the same cause of action. The scope of the rule was greatly extended by alteration, and it can no longer be said that the order relates only to joinder of parties and not to joinder of causes of action. Reference may in this connection be made to the judgment of Bowen, L. J. in *Hannay v. Smurthwaite* (3), which emphasises the distinction between the expression "right to any relief" which was used in the old rule and the phrase "any right to relief" which is used in the rule now in force. The history of this alteration is explained in the case of *Oxford and Cambridge University v. Gill* (4), which followed the decision in *Stroud v. Lawson* (5). That the altered rule covers joinder of parties as also causes of action must now be treated as indisputable in view of the decisions in *Bullock v. London General Omnibus Co.* (6); *Compania v. Houlder Bros.* (7); *Markt & Co. v. Knight Steamship Co.* (8) and *Times Cold Storage v. Lowther* (9). It is further worthy of note that although the phraseology of R. S. C. order 16, rule 3 which relates to joinder of defendants has not been altered, its scope has recently been deemed to have been enlarged by reason of the alteration effected in R. S. C. order 16, rule 1, which treats of joinder of plaintiffs: *Compania v. Houlder Bros.* (7). Consequently, as under

(1) (1913) 13 Mad. L. T. 282.

(2) (1894) App. Cas. 494.

(3) (1893) 2 Q. B. 412.

(4) (1899) 1 Ch. 55.

(5) (1898) 2 Q. B. 44.

(6) (1907) 1 K. B. 264 (271, 272).

(7) (1910) 2 K. B. 354.

(8) (1910) 2 K. B. 1021 (1036).

(9) (1911) 2 K. B. 100 (107).

our Code, the rules relating to the joinder of defendants has been framed on the same lines as the altered rule relating to the joinder of plaintiffs (order 1, rules 1 and 3, there is even much stronger reason here than in England to hold that order 1, rule 3 applies to questions of joinder of parties as also joinder of causes of action. I do not feel pressed by the phrase "save as otherwise provided" which occurs in order 2, rule 3(1). I am not prepared to read into this rule the words "in this order" after "provided," specially in view of the language used in R. S. C. order 18, rule 1, whereon our rule is based. Nor do I feel embarrassed by the decision in *Thompson v. London County Council* (1), *Munday v. South Metropolitan Co.* (2), and *Greenwood v. Greenwood* (3), which do not militate against the view that R. S. C. order 16, rules 1 and 3 relate to misjoinder of parties as also causes of action. The decision in *Thompson v. London County Council* (1), which overlooks the cases of *Stroud v. Lawson* (4), and *Oxford and Cambridge University v. Gill* (5), was explained in *Frankenberg v. Great Horseless Carriage Co.* (6), and *Compania v. Houlder Bros.* (7). The case is an authority only for this principle, if you have suffered a wrong, it may be that A is the person who has committed it, in which case he is liable, but, perhaps, you are not certain that it may not be B who has committed it, and, if so, B is liable; as between A and B, they are strangers to each other in the matter; and, then, because you cannot ascertain whether A or B committed the wrong, you cannot bring the action for damages against A and B jointly. The two other decisions mentioned are clearly distinguishable on their special facts. Similarly, *Gower v. Couldridge* (8), which followed *Sadler v. G. W. Ry. Co.* (9), and was explained in *Frankenberg v. Great Horseless Carriage Co.* (6), only illustrates the principle that if you have a cause of action against A and B for a tort X, and quite a separate cause of action against B for tort Y, you cannot in one action unite claims in respect of both torts X and Y against A and B. Reliance has been placed on behalf of the respondents on the decision of the House of Lords in *Sadler v. Great Western Railway Co.* (9), [which was applied in *Gower v. Couldridge* (2),] and of the Court of Appeal in *Stroud v. Lawson* (3), but neither case lends support to the theory that R. S. C. order 16, is restricted to joinder of parties and throws

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(1) (1899) 1 Q. B. 842.

(3) (1908) 100 L. T. 68.

(5) (1899) 1 Ch. 55.

(7) (1910) 2 K. B. 354.

(2) (1913) 29 T. L. R. 346.

(4) (1858) 2 Q. B. 44.

(6) (1900) 1 Q. B. 504.

(8) (1898) 1 Q. B. 348.

(9) (1896) App. Cas. 450.

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no light on questions of joinder of causes of action. The matter is one essentially of substance and not of form, as Romer L.-J. observed in *Frankenberg v. Great Horseless Carriage Co.* (1), and I am not prepared to put a narrow construction upon the provisions of order 1. On the one hand, we have the fundamental principle that ¹needless multiplicity of suits should be avoided; on the other hand, we have the equally essential principle that ²the trial of the suit should not be embarrassed by the simultaneous investigation of totally unconnected controversies. The legislature has effected a compromise of these two principles by means of the rules embodied in orders 1, and 2, which may possibly overlap to some extent in their application to concrete cases. It is not the function of the Court, however, to determine how far the rules are appropriate; we are bound to interpret them in their natural sense and apply them to the circumstances of each case. I hold, accordingly, that order 1, rule 1 and order 1, rule 3 apply to questions of joinder of parties as also of causes of action, and I respectfully dissent from the contrary view adopted by Dovar, J. in *Umabai v. Bhau Balwant* (2) and *Jankibai v. Srinivas* (3) without examination of or reference to the later decisions in England as to the scope and meaning of the corresponding rules in that system.

The question next arises, whether the present suit has been constituted in conformity with order 1, rule 3. The determining factors applicable here are, first, ¹could the right to relief against the defendants be said to be in respect of or arising out of (expressions obviously of wider import than relating to) the same act or transaction, and, secondly, ²would any common question of law or fact arise, if separate suits were brought. As regards the first test, there can in my opinion be no doubt that the right to relief against each of the defendants is based upon the same act, namely, the alleged fraud of Brajendranath Das, and this is so notwithstanding the fact that there may have been subsequent acts or transactions in which the different defendants are individually concerned and which may enable them to raise distinct defences. As regards ²the second test, it is clear that if different suits were instituted, at least one common question of fact will arise, namely the exact nature of the act imputed to Brojendranath Das which would have to be investigated presumably on the same evidence separately adduced in the several suits. Here, again, it is important to observe that the Code does not require that all the questions of law or fact which arise should be

(1) (1900) 1 Q. B. 504.

(2) (1908) I. L. R. 34 Bom. 358.

(3) (1913) I. L. R. 38 Bom. 120.

common to all the parties. The contention of the respondents was, in fact, based upon two fallacious assumptions, namely, first, that the rules require that each of the defendants should have been concerned in all the transactions, and, secondly, that, if different suits were brought, no question would arise in which all the defendants were not interested. There is clearly no foundation whatever for either of these assumptions: [Cf. *Dringiber v. Wood*. (1)]. There is further no basis for the hypothesis, put forward at one stage on behalf of the defendants, that questions of joinder of parties and causes of action are governed by different principles according as the claim is founded on breach of contract or on tort; as Collins M. R. observed in *Bullock v. London General Omnibus Co.* (2) there is no reason for such a distinction. In my opinion, the case before us is completely covered by order 1, rule 3. I may add that the underlying principle of this conclusion is in exact conformity with what has been the recognised rule in this Court in two well-known classes of cases, namely, first, suits by reversioners for recovery of the estate of the last full owner alienated by a limited or qualified owner during her period of possession and enjoyment, and, secondly, suits for possession by the real owner against holders under derivative titles from a trespasser as common source. The decision in *Ishan Chunder v. Rameswar* (3), may be taken as representative of the former class of cases. On the other hand, the decision in *Nando Kumar v. Banamali* (4) where Hill J. refers to the instructive cases of *Hodgins v. Hickson* (5) and *Minet v. Johnson*, (6) may be taken as the type of the second class of cases. I do not feel pressed by the decisions in *Mullick v. Sheo Prasad* (7) and *Sarala v. Saroda* (8) which ruled that under the Code of 1882 there was no provision for joinder of distinct causes of action against distinct defendants. The Code of 1908 brings the rules on the subject in a line with the corresponding rules in England, and the object which the framers of the new Code had in view, would be completely frustrated, were the Courts to allow their effect to be qualified by reference to decisions under the Code of 1882, pronounced on provisions some of which, at any rate, have been omitted or materially altered (See, for instance sections 31 and 45 of the Code of 1882).

There is no force in the contention that grave inconvenience will be caused to some of the parties as they will have to be present

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(1) (1899) 1 Ch. 393.

(3) (1897) 1 L. R. 24 Calc. 831.

(5) (1878) 12 Ir. L. T. 104; 39 L. T. 644.

(6) (1890) 63 L. T. 507.

(8) (1904) 2 C. L. J. 606.

(2) (1907) 1 K. B. 264 (271).

(4) (1902) 1 L. R. 29 Calc. 871.

(7) (1896) 1 L. R. 23 Calc. 821.

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during the discussion of questions which specially affect others alone. The remedy for any possible inconvenience on this ground is supplied by the provisions of order 2, rule 6 which authorises the Court to order separate trials of causes of action which though joined in one suit cannot be conveniently tried or disposed of together. As pointed out by Scott, C.J. in *Uma Bai v. Vithal* (1) the Court is competent to direct the successive trial of the issues separately affecting different defendants and to record interlocutory judgments thereon to be made the basis of the final judgment at the conclusion of the trial of the whole case.

In my opinion the suit as framed is not open to objection on the ground of misjoinder of parties and causes of action and should consequently be tried on the merits. I agree that the appeal must be allowed with costs and the order of Mr. Justice Chitty reversed.

Watkins and Co.—Attorneys for the Appellant.

Morgan and Co. Dut: and Sen, Wilson, Pugh and Co. Orr, Dignam and Co. and A. C. Bose, B. N. Bose & Co.—Attorneys for the Respondents.

A. T. M.

Appeal allowed.

(1) (1903) I. L. R. 33 Bom. 293 (306).

PRIVY COUNCIL.

PRESENT: *Lord Dunedin, Lord Shaw, Lord Sumner, Sir John Edg  and Mr. Ameer Ali.*

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MA SHWE LA AND OTHERS.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

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and July, 26.

Indian Evidence Act (I of 1872), Secs. 98, 99—Construction—Absolute conveyances, alleged to be transfers of mortgages—Whether evidence in proof of such allegation may be given—Dealings with a third person's property—Evidence of notice of third person's title.

Respondents sued for possession under deeds purporting to be absolute conveyances. Appellants tendered evidence to show that to the respondent's knowledge the properties belonged to a third person who had mortgaged them to appellants and that the deeds were intended to operate only as transfers of the mortgages.

Held, that such evidence was admissible.

Section 92 of the Indian Evidence Act, which excludes evidence contradicting the terms of written instruments, in terms applies only "as between the parties to any such instrument or their representatives in interest." Whenever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such case the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

Held, also, that if section 92 applied, proviso 1 to that section would admit the evidence, because it would be a fraud to insist upon a claim to property arising out of such a transaction, the claimant knowing that the true owner had never parted with it.

In cases to which section 92 is applicable, the English equity doctrine as expressed by Lord Justice Turner in *Lincoln v. Wright* (1) and followed in a long series of Indian cases was definitely excluded in India by the decision in *Balkishen Das v. Legge* (2). The law is that oral evidence is not admissible for the purpose of ascertaining the intention of parties to written documents, and though attempts have been made to engraft an exception on this rule in favour of evidence relating to the acts and conduct of the parties, it is now settled that such evidence is inadmissible. *Achutaramaraju v. Subbaraju* (3); *Maung Bin v. Ma Hlaing* (4); and *Dattoo Valad Totaram v. Ramchandra Totaram* (5) approved. *Baksu Lakshman v. Govinda Kanji* (6); *Hemchunder Soor v. Kally Churn*

(1) (1859) 4 DeG. & J. 16.

(2) (1899) L. R. 27 I. A. 58; I. L. R. 22 All. 149.

(3) (1901) I. L. R. 25 Mad. 7.

(4) (1905) 3 L. B. R. 100.

(5) (1905) I. L. R. 30 Bom. 119.

(6) (1880) I. L. R. 4 Bom. 594.

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Das (1); *Rakhen v. Alagappudayan* (2); *Pronath Shaha v. Madhu Sudan Bhuiya* (3); *Khankar Abdur Rahman v. Ali Hafiz* (4) and *Mahomed Ali Hossein v. Nazar Ali* (5) overruled.

Appeal from a decree (3rd August, 1914) of the Chief Court of Lower Burma and in its appellate jurisdiction, reversing a decision of Robinson, J.

The question in this case was whether any and if so what evidence was admissible to show that certain transactions which on the face of the documents affecting them purported to be sales were in fact mortgages only. A full account of the earlier proceedings will be found in *Maung Kyin v. Ma Shwe La* (6). The Privy Council in their judgment there reported referred the case to the Chief Court of Lower Burma for a new trial. Robinson, J. took evidence as directed by the Privy Council (which left open the question as to the admissibility of such evidence) and on such evidence found that the transactions were intended by the parties to be mortgages and that the plaintiffs were guilty of fraud in suing for possession on the basis of their being sales. He accordingly dismissed the suit. The appellate Court (Hartnoll C. J. and Ormond J.) reversed this decision, on the ground that there had been no fraud on plaintiffs' part in procuring the documents and that oral evidence was not admissible to vary their terms. They gave plaintiffs' a decree for possession. Hence this appeal.

Sir Eric Richards, K. C., and *Coltman*, for appellants, submitted that the evidence taken by Robinson, J. was admissible. The Board on the previous occasion had held that evidence would be admissible to show fraud and also that the deeds in question could not affect the ownership of a third party not a party to the transaction.

If A and B having notice make an absolute conveyance of C's property it cannot affect C. I am arguing this on the assumption that I am Myaing : I have all his rights.

I am here as Myaing and I cannot be affected by what two other people do behind my back.

Section 92 of the Indian Evidence Act, deals with the parties to documents : the section which deals with persons who are not parties is section 99. Being a third party I am covered by section 99 and also by the previous judgment of the Board in this case. The facts

(1) (1883) I. L. R. 9 Calc. 528.

(2) (1892) I. L. R. 16 Mad. 80.

(3) (1898) I. L. R. 25 Calc. 603.

(4) (1900) I. L. R. 28 Calc. 256.

(5) (1901) I. L. R. 28 Calc. 289.

(6) (1911) L. R. 38 I. A. 146 ; I. L. R. 38 Calc. 892 ; 14 C. L. J. 276.

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then were hypothetical but they have since been established by concurrent findings. The Board laid down that if I could prove these facts section 92 is not in my way. I have proved them. I stand altogether outside the Evidence Act. The plaintiffs here took with notice and the principle must be the same whether or not English rules apply : it is a principle of natural equity : *Ramcoomar Koondoo v. Macqueen* (1).

The Courts in India are not precluded by the Indian Evidence Act from exercising in such cases a jurisdiction similar to that of the Chancery Court in England—*Vide* Ameer Ali's Law of Evidence, notes to section 92 of the Indian Evidence Act.

Secondly, I rely on provisos (2) and (3) to section 92. You can always have a deed that is only to come into effect under certain circumstances. An agreement that a sale shall be subject to redemption would be a separate oral agreement on a subject on which a document is silent.

Thirdly, evidence of conduct of the parties is admissible notwithstanding section 92 : See *Baksu Lakshman v. Govinda Kanji* (2) ; Specific Relief Act, Section 26 Ill. (d) : *Hem Chunder Soor v. Kally Churn Das* (3) ; *Preonath Shaha v. Madhu Sudan Bhuiya* (4) ; *Rakken v. Alagappudayan* (5) and *Barton v. Bank of New South Wales* (6).

In *Preonath Shaha v. Madhu Sudan Bhuiya* (4), a Full Bench of the Calcutta High Court adopted previous decisions that such evidence was admissible : *Achutaramaraju v. Subbaraju* (7), purported to follow *Balkishen's case* (8), of which it took a wrong view. In *Sah Lal Chand v. Indarjit* (9), this Board held that a statement of fact in a document might be contradicted : an oral agreement as to consideration was then allowed to be proved. *Balkishen's case* (8), merely laid down that oral evidence of the intention of parties to deeds was inadmissible : it did not deal with the evidence of their subsequent conduct. This was held by the Calcutta High Court in *Khankar Abdur Rahman v. Ali Hafaz* (10), where a view of *Balkishen's case* (8), was taken opposed to that expressed in *Achutaramaraju v. Subbaraju* (7). *Mahomed Ali Hossein v. Nazar Ali* (11) is in my favour. The judgment from which we appeal proceeded

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(1) (1872) I. A. Sup. Vol. 40 (43) ; 11 B. L. R. 46 ; 18 W. R. 166.

(2) (1880) I. L. R. 4 Bom. 594 (597, 598).

(3) (1883) I. L. R. 9 Calc. 528 (533).

(5) (1892) I. L. R. 16 Mad. 80, (82, 83.)

(7) (1901) I. L. R. 25 Mad. 7.

(8) (1899) L. R. 27 I. A. 58 (65) ; I. L. R. 22 All. 149.

(9) (1900) L. R. 27 I. A. 93 ; I. L. R. 22 All. 370.

(10) (1900) I. L. R. 28 Calc. 256.

(4) (1898) I. L. R. 25 Calc. 603.

(6) (1890) A. C. 379.

(11) (1901) I. L. R. 28 Calc. 289.

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on the Burma Full Bench case of *Maung Bin v. Ma Hlaing* (1), which is no doubt against me.

Hanifunnisa v. Faizunnisa (2), I submit, a clear decision under which I can prove what I want to prove : Lord Macnaghten allowed the children there, the "purchasers" to prove that the deed of sale was really a gift.

There is a decision in the Bombay High Court in 1905, *Dattoo Valad Totaram v. Ramchandra Totaram* (3) against me.

To sum up, I submit (1) that I am within the actual decision of this Board, (2) that I can prove what I want to prove (3) that anyhow evidence of subsequent conduct is admissible, and ample for my purpose.

De Gruyther, K. C., and *T. E. Forster* for Respondents submitted that the decision appealed against was correct. A transfer of immovable property in India can only be by an instrument in writing and registered : Transfer of Property Act (Act IV of 1882), sections 54, 59, Indian Registration Act (Act III of 1877), sections 17(b), 49. The burden of proving that a document is not what it purports to be is on those who allege it. Here it is contended that there was a contemporaneous oral agreement that what purported to be a sale should be a mortgage. The case turns on section 92 of the Indian Evidence Act. Two views of this have been taken : (1) what I may call the Bombay, Madras and Burma view, that no evidence at all is admissible, and (2) the view that no *parol* evidence is admissible. I submit the first view is the correct one. The plain words of the statute are in my favour.

If the principle adopted in *Lincoln v. Wright* (4), applied to India there would be an end of the matter : even *parol* evidence would be admissible. But this Board had held in *Balkishen's case* (5), that, you cannot rely on those English Chancery decisions : that you must go by the words of the Indian Evidence Act.

If this sort of evidence is admissible at all it is admissible also against the mortgagor. Suppose the property goes down in value : the purchaser may say the transaction was a mortgage, and might prove high interest was agreed on. He might sue for a decree for sale, and get the property and some money to boot.

Balkishen Das v. Legge (6) is reported. Originally there was a mortgage without possession. A fresh advance was made, and it

(1) (1905) 3 L. B. R. 100.

(2) (1911) L. R. 38 I. A. 85 ; 13 C. L. J. 510 ; I. L. R. 33 All. 340.

(3) (1905) I L. R. 30 Bom. 119.

(4) (1859) 4 DeG & J. 16.

(5) (1899) L. R. 27 I. A. 58 ; I. L. R. 22 All. 149.

(6) (1897) I. L. R. 19 All. 434. On appeal (1899) L. R. 27. I. A. 58 ; I L. R. 22 All. 149.

was intended to convert the mortgage into one with possession. A deed of sale and a deed of covenant to resell were drawn up. Years after Legge sued for redemption. Balkishen alleged that the second deed was merely executed out of kindness. It was held by the Board that effect must be given to it.

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The foundation of the argument against me is to be found in Melville J.'s judgment in *Baksu Lakshman v. Govinda Kanji* (1). That case is decided on the ground that the Bombay High Court had equitable jurisdiction.

Hem Chunder Soor v. Kally Churn Das (2), proceeds on the same footing.

I rely on the following cases : *Achutaramaraju v. Subbaraju* (3) ; *Dattoo Valad Totaram v. Ramchandra Totaram* (4), *Mottayappan v. Palani Goundan* (5).

There is no third party here. Assuming the transaction is a mortgage, as soon as Kyin assigned to Pe, Kyin's mortgage is discharged and he goes out : by the assignment Myaing becomes mortgagor and Pe mortgagee, and appellant having acquired Myaing's equity of redemption claims to stand in his shoes.

Both Courts here have found that there was no antecedent fraud : that everybody entered into the transaction honestly. Robinson J. has found subsequent fraud, but the appellate Bench of the Chief Court have held that *Balkishen Das v. Legge* (6), precludes proof of it.

I contend that no evidence of acts and conduct is admissible. Even if this be too wide, you have to distinguish between acts and conduct and parol evidence of such acts and conduct.

The first kind of acts and conduct relied on is the payment of interest. Robinson J. does not find this.

If you infer a mortgage from acts and conduct, you cannot fix its terms so as to give us a remedy : we shall lose our money altogether.

Sir Erle Richards replied : There are concurrent findings that Myaing and Kyin have all along remained in possession except as to small pieces of the property, and that the "price" was an undervalue. The question of sale at an undervalue was considered in *Balkishen's case* (6).

Their Lordships' judgment was delivered by

(1) (1890) I. L. R. 4 Bom. 594 (598, 602, 603, 605).

(2) (1883) I. L. R. 9 Calc. 528 (533). (3) (1901) I. L. R. 25 Mad. 7.

(4) (1905) I. L. R. 30 Bom. 119. (5) (1913) I. L. R. 36 Mad. 226 (230).

(6) (1889) L. R. 27 I. A. 58 (68) ; I. L. R. 22 All. 149.

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Lord Shaw.—This is an appeal originally brought by the defendants Maung Kyin, since deceased, and Maung Kyaw, from a judgment and decree of the Chief Court of Lower Burma in its civil appellate jurisdiction, dated the 3rd August, 1914, reversing the judgment and decree of the Chief Court in its civil original jurisdiction, dated the 17th June, 1912. The matters in suit between the parties have, on a former occasion, formed the subject of an appeal to this Board: The judgment upon that appeal was pronounced on the 11th July, 1911, and is reported [*Maung Kyin v. Ma Shwe La* (1)]. The meaning and effect of that judgment will be presently referred to.

The property which is the subject of the appeal consists of four different parcels of land situated in Kemmendine, a suburb of Rangoon. The facts of the case may be briefly stated thus: The owner of these plots of land was one Ko Shwe Myaing. On the 30th November, 1901, Myaing, having borrowed from Maung Kyin and Ma Ngwe Zan, his wife, 8,500 rupees, to bear interest at 1·8 per cent. per month, granted an out-and-out conveyance of two of these properties, which may be called (a) and (b), in favour of Kyin and his wife. No possession passed: interest was paid by Myaing and repayment of the loan to the extent of 3,500 rupees was also made. This left an unpaid balance of 5,000 rupees. On the 4th March, 1903, Kyin and his wife obtained payment of this sum from U Shwe Pe and his wife, and conveyed the properties (a) and (b) to the latter.

There were two other plots of land, which may be called (c) and (d). Kyin and his wife on the 13th February, 1902, having advanced 11,565 rupees, purchased these properties, which then also belonged to Myaing, by public auction. No possession passed. On the 4th March, 1903, Kyin and his wife transferred these properties to Shwe Pe and his wife in consideration of a payment of 11,000 rupees, 565 rupees having in the meantime been paid by Myaing. The state of matters accordingly was that, on the date last mentioned, namely, the 4th March, 1903, U Shwe Pe and his wife became by *ex facie* absolute conveyances from Kyin and his wife vested in all the properties in suit.

Myaing was no party to these later transactions, but there is some correspondence showing that his part in the transaction was that he was desirous of having, and he obtained the benefit of, a reduction in the rate of interest from 1·8 per cent. per month to 1 per cent.

Then, on the 20th November, 1905, Myaing conveyed to the Kyins his equity of redemption. The footing upon which this deed

(1) (1911) L. R. 38 I. A. 146; 14 C. L. J. 276; I. L. R. 38 Calc. 892.

was granted was manifestly that Myaing, notwithstanding the absolute conveyances, still considered himself as only having granted mortgages over his property, and having therefore an equity of redemption thereon, which he was free to dispose of.

U Shwe Pe having died, his widow and children brought this suit for possession of the lands, it being directed against Kyin and his wife. They resist possession being given, and maintain in substance that, although the conveyances to U Shwe Pe and his wife bear to be absolute in form, it was well known to them that the true nature of the transaction was one of mortgage upon the security of the properties. In particular, it is maintained that Shwe Pe and his wife knew that Kyin and his wife, who purported to grant the conveyance in absolute terms, were not in fact the owners of the property, but themselves only lenders thereon. This is an important consideration, as will afterwards appear, because it amounts to this : that the transfer, although *ex facie* of the deeds absolute in form, was in truth and to the knowledge of both parties a transfer *a non domino*. The dominus was Myaing, who was not a grantor. In short, the Kyins were supporting to sell and the Shwe Pe purporting to buy what both the nominal sellers and buyers knew to belong to somebody else.

When the matters in dispute were before this Board upon a former occasion, it was decided that evidence upon the topics above mentioned could be received, but no final judgment was given as to the effect to be given to such evidence after its reception.

The proof having been taken, their Lordships are now in possession of the facts and of concurrent findings upon the most important of these. It may be well to note how this stands. The learned Judge of the Chief Court (Original Civil Jurisdiction) puts the matter thus :—"The evidence in my opinion taken as a whole, coupled with the conduct of the parties, shows that U Myaing and defendant meant their dealings resulting in Exhibits C and D to be mortgages. It is clear that U Myaing's object in the negotiations, which resulted in Exhibits A and B, was to transfer defendant's mortgage to his relative U Shwe Pe at a lower rate of interest, and U Shwe Pe's letters show he knew this and agreed to take over a mortgage. If he deliberately got deeds of sale executed, it was a gross fraud on U Myaing, and the evidence is admissible to show this. He now endeavours to profit by his fraud or has since determined to try and get the property by taking advantage of the old Burmese custom of taking a sale deed where a mortgage only was contemplated. He cannot profit by his fraud.

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"I therefore hold that defendants were mortgagees only and that U Shwe Pe had notice of the fact."

Upon appeal in the Chief Court (Civil Appeal) the learned Judges held :

"If, however, evidence is admissible for the purpose of showing what was the real transaction ; the facts (apart from the evidence which has been admitted under section 33 of the Evidence Act) would clearly show that the parties concerned, viz : U Myaing, defendant Maung Kyin and U Shwe Pe, all intended that U Shwe Pe and his wife should take a transfer of the defendant's mortgages in the form of outright sales."

Upon the non-admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence Act of 1872. It provides that when the terms of a contract, grant, or disposition are reduced to writing "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms." The first proviso is to the effect that "any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud . . . , want of failure of consideration, or mistake in fact or law."

Founding upon this section, the respondents maintain that the whole of the evidence led must be rejected. On the contrary, the appellants maintain that, notwithstanding the terms of the section, they are entitled to set up and prove the acts and conduct of the parties as inconsistent with the transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, that cases cited being *Baksu Lakshman v. Govinda Kanji and another* (1), *Hem Chunder Soor v. Kally Churn Das* (2) ; *Rakken and another v. Alagappudayan* (3) ; *Preonath Shaha v. Madhu Sudan Bhuiya* (4) ; *Khankar Abdur Rahman v. Ali Hafez and others* (5) ; *Mahomed Ali Hossein v. Nazar Ali and others* (6) The judgment of Mr Justice Melville in the first of these cases is repeatedly founded upon in the course of the series, in which that learned Judge expressly followed the English equity doctrine as expressed in *Lincoln v. Wright* (7) by Lord Justice Turner thus :—

(1) (1880) I. L. R. 4 Bom. 594.

(3) (1892) I. L. R. 16 Mad. 80.

(5) (1900) I. L. R. 28 Calc. 256.

(7) (1859) 4 DeG. and J. 16.

(2) (1883) I. L. R. 9 Calc. 528.

(4) (1898) I. L. R. 25 Calc. 603.

(6) (1901) I. L. R. 28 Calc. 289.

"The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court fraud to insist on the conveyance as being absolute, and parole evidence must be admissible to prove the fraud."

In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das and others v Legge* (1). It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites section 92 of the Indian Evidence Act, and adds :—

"The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

Notwithstanding the decision of this Board, however, a certain conflict of authority on the subject still remains in India. But the respondents rightly refer to *Achutaramaraju and another v. Subbaraju* (2), *Maung Bin v. Ma Hlaing* (3), and *Dattoo Valad Totaram v. Ramchandra Totaram and another* (4), and in particular to the judgment of Chief Justice Jenkins in the last case. In these the judgment of the Board, as pronounced by Lord Davey, has been rightly followed and applied.

The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But, to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence, for the reasons set forth in *Lincoln v. Wright* (5) and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the

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(1) (1899) 1 L. R. 27 I. A. 58 ; I. L. R. 22 All. 149.

(2) (1901) I. L. R. 25 Mad. 7.

(3) (1905) 3 L. B. R. 130.

(4) (1905) I. L. R. 30 Bom. 119.

(5) (1859) 4 DeG. & J. 16.

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Indian Evidence Act, and it accordingly remains to be asked, What is the evidence which under that statute may be competently adduced? The language of the section in terms applies and applies alone "as between the parties to any such instrument or their representatives in interest." Wherever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

Their Lordships view the case accordingly as having been dealt with on that footing by their predecessors at the Board. Thus, while in the course of the judgment of Lord Robson reference was made to evidence which might be taken "relating to the acts and conduct of the parties as distinguished from oral evidence and conversations constituting in themselves some agreement between them," nothing was decided upon that head, except that it would give rise to important and difficult questions under the Indian Evidence Act. That question has now been settled by their Lordships, adversely to the reception of the evidence.

But the later passage of the judgment of Lord Robson is upon a topic much more crucial to the situation which the facts proved in the case admittedly disclose:—

"Their Lordships," said he, "however, are of opinion that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, section 92 of the Indian Evidence Act, even if construed according to the respondents' contention, will not avail them. It is applicable to an instrument "as between the parties to any such instrument or their representatives in interest," but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance."

Upon the facts it now turns out quite plainly, and it was, indeed, admitted in argument that, when Shwe Pe took the conveyance from the Kyins, he knew that it was a conveyance of property which belonged to Myaing, and that accordingly the grant proceeded *a non domino*. If section 92 applied, proviso 1 would seem to be in point,

because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But, in the opinion of their Lordships, section 92 does not apply, because the evidence, the admissibility of which is in question, is evidence going to show what were the rights of a third person, namely Myaing, in the property, and there are concurrent findings to the effect that the property was in that owner and not in the Kyins, who to the knowledge of Shwe Pe never purported to dispose of it as theirs. If a purchaser for onerous consideration and without notice had been the grantee under a deed of absolute conveyance, a totally different set of considerations would have arisen. In the present case, however, both grantor and grantee were dealing with the property of an owner who was a third person, who was not in the language of the statute either a party to the instrument or a representative in interest of a party to the instrument. The evidence led as to that third party's rights is admissible, and, if admissible, is most relevant. Their Lordships do not hold any doubt upon the subject of fact, in that respect entirely agreeing with all the Courts below. It is true that the Court of appeal felt precluded by the terms of section 92 of the Evidence Act from agreeing with the Judge of the Chief Court, but in the opinion of the Board the section is, in the important particular last dealt with, no bar to the admission of the light on the true situation of the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, the decree of the Chief Court in its appellate jurisdiction, dated the 3rd August, 1914, set aside with costs, and the decree of the Chief Court in its original jurisdiction restored.

The respondents will pay the costs of the appeal.

Arnould & Son:—Solicitors for the Appellant.

Bramall & White:—Solicitors for the Respondents.

J. M. P.

Appeal allowed.

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PRESENT: *Lord Parker of Waddington, Lord Wrenbury, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.*

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October 19.

SAUDAGAR SINGH

v.

PARDIP NARAYAN SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Declaratory decree—Alienation by a Hindu widow—Next reversioner—Declaration involving a finding that the claimant is the next reversionary heir—Specific Relief Act (1 of 1877), section 42, Illustration (c).

Where any deed is executed by the widow of a nonless Hindu, the result of which may be to prejudice the interests of the reversionary heirs those heirs, though still reversionary and though they may never get any title because events preclude them from doing so, may, under the Specific Relief Act, section 42, illustration (c), have a declaration as to the effect of the deed, notwithstanding the fact that the declaration given involves a finding that the person in whose favour it is made is a reversionary heir.

Janaki Ammal v Narayanasami Aiyer (1) distinguished.

Appeal against a judgment and decree of the High Court (Stephen and Mullick, JJ.) at Calcutta, dated the 29th January, 1914, reversing a judgment and decree of the Court of the Subordinate Judge, Third Court, Patna, dated the 16th February, 1909.

The parties to the litigation were subject to the Mitakshara school of Hindu Law.

The facts of the case were as follows: The properties in suit belonged to one Deo Narayan Singh, who was separate and died leaving him surviving his widow Mussúmmat Jaibasi Koer (who was defendant 1) and a childless widowed daughter Mussummat Sakhal-bati Koer (who was defendant 2). The appellant, who was the son of an uncle of Deo Narayan, named Mahipat Singh, was defendant in the suit.

On the 27th day of April, 1906, the two ladies executed a voluntary deed of assignment called a *Tamliknama*, in favour of the appellant, assigning and transferring to him all the suit properties left by the said Deo Narayan Singh, and making him (the appellant) the absolute owner thereof from the date of the deed. The document recited that the appellant was the only next reversioner, and stated that "there is no knowing that any mischievous person may

(1) (1916) L. R. 43 I. A. 207; 24 C. L. J. 302; I. L. R. 39 Mad. 634.

create some mischief and dispute in respect of the properties, therefore it is advisable that we (the ladies) should make some arrangement in our lifetime as regards our properties; so that there may not be any chance of dispute and Bahu Saudagar Singh and his sons and heirs may take possession as owners and become the absolute proprietors of our properties, and may enjoy in perpetuity and in succession the proceeds thereof." Then followed the operative part which, absolutely conveyed the suit properties to the appellant without any reservation whatsoever.

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On the strength of the *Tamliknama* the appellant obtained possession of the suit properties as the absolute owner thereof.

The plaintiffs in the suit were three brothers, who were the sons of another uncle of Deo Narayan called Drignal Singh. They alleged *inter alia* that they and the appellant were the next reversioners of the deceased Deo Narayan Singh, and that the two ladies had no legal power to execute the said *Tamliknama*, and contended that it was not binding on the inheritance. The plaintiffs, therefore, prayed "that the Court may be pleased to hold that the defendants Nos. 1 and 2 had no right to execute the *Tamliknama*, and that the defendant No. 3 (the appellant) has acquired no title thereunder; and to declare the deed of *Tamliknama* ineffective and inoperative as against the plaintiffs."

The plaintiffs also claimed possession, appointment of a receiver and other reliefs, but in the High Court they abandoned their claim for all these reliefs. The defence of all the defendants was the same. They pleaded *inter alia* that the suit was not maintainable and that the plaintiffs had no cause of action. They alleged that the father of the appellant and the father of the deceased Deo Narayan Singh were brothers of full blood and the plaintiffs' father was only the half-brother of those two brothers, and consequently the appellant was the only next reversioner of the late Deo Narayan Singh. The defendants therefore contended that the ladies were within their legal rights in executing the *Tamliknama* in favour of the appellant alone, and in accelerating the inheritance in his favour; that the *Tamliknama* was binding on all the reversioners, and that the appellant had by virtue thereof become the owner of the suit properties from the date of the document.

The Subordinate Judge dismissed the suit with costs. He held that as the ladies were living no cause of action had accrued to the plaintiffs, and that the suit was not maintainable in its present form. He was "of opinion that the plaintiffs are reversionary heirs of Deo Narayan and that they are in the same range with Saudagar (appellant).

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I am also of opinion that Mahipat, father of Saudagar, Saligram, father of Deo Narayan, and Drigpal, father of the plaintiffs, were brothers of the whole blood." His opinion with regard to the *Tamliknama* was that it was "a valid deed and is operative against the plaintiffs during the lifetime of the defendants Nos. 1 and 2 and not after their deaths." In the result he held that as there was no cause of action for the suit it must be dismissed with costs.

The plaintiffs appealed to the High Court, where the only relief they claimed was a declaration to the effect that the *Tamliknama* was not operative as against them. The High Court (Stephen and Mullick, JJ.) allowed the appeal and decreed the suit with costs. The learned Judges agreed with the Court below in finding that the father of the appellants, the father of the late Deo Narayan Singh and the father of the plaintiffs were brothers of the whole blood, and that the plaintiffs and the appellant were the next reversioners of Deo Narayan Singh. They held that the pleadings were so framed as to include the declaration asked for by the plaintiffs, and that the plaintiffs were entitled to a declaration that the *Tamliknama* was not valid and not operative as against them after the deaths of the two ladies. The material part of the judgment was as follows:—

"This brings us to the real point at issue, as to which the plaintiffs' contention is that a reversioner on a limited estate is entitled to a declaration that a deed is invalid if its invalidity depends on facts which may be obscured by lapse of time, and that the invalidity or otherwise of the *Tamliknama* depends on the question—whether the brothers were sons of the same mother or not, which can be more easily settled now than later. He relies on the decision of Phear J. in *Sheo Pergash Roy v. Injori Tewary* (1) and on illustration (c) of section 42 of the Specific Relief Act as authority for this proposition. The respondent on the other hand contends that while the proposition of law put forward by the appellant is unimpeachable, it does not apply to the facts of the present case; for what the plaintiffs seek is a declaration that they are now reversionary heirs by reason of being related to the defendants' branch of the family by whole and not by half blood, and the Court will not make a declaration to establish heirship before the succession in regard to which it is claimed has opened out, a proposition for the truth of which he refers us to *Kattama Natchiar v. Dorasinga Tevar* (2), if authority be needed. Neither side disputes the law propounded by the other, and the simple question we have to decide is

(1) (1874) 24 W. R. 433.

(2) (1875) L. R. 2 I. A. 169 (191) 15 B. L. R. 83.

what is the declaration that is sought for in this case. As to this we have no doubt that the plaintiffs are asking among other things to have the Tamliknama declared inoperative as against themselves and the fact that such a declaration must be founded on reasons that would support a declaration that they are heirs to Deo Narayan, were it open to us to make such a declaration, cannot shut him out of his right to a declaration as to the validity of the document in question. This fact has been overlooked by the Court below, where the case was argued with much greater complexity of issues than we have had to deal with. The appeal is accordingly allowed, the judgment and decree of the lower Court are set aside, the suit is decreed in favour of the plaintiffs and it is declared that the deed in question is inoperative against them. The plaintiffs are entitled to their costs in this Court and the Court below."

The appellant thereupon appealed to His Majesty in Council.

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Sir Erle Richards, K. C., and *Dunne, K. C.*, for the appellant: The suit was brought to recover immediate possession on the ground that the execution of the Tamliknama by the ladies was an act of waste on their part. But the effect of that deed was to give the appellant the interest of the ladies, and the Subordinate Judge was right in dismissing the suit on the ground that there was no cause of action during the life-time of the ladies. The High Court has given the plaintiffs a declaration the effect of which is to declare that they are the next reversioners. But the reversioners are not entitled to bring a suit for such a declaration: See *Mayne's Hindu Law*, 8th ed. paras. 647, 648, 649 and 651.

[Lord Parker referred to the Specific Relief Act, 1877, section 42, Illus. (e)].

Where a suit for possession fails, the Court ought not to give the plaintiffs a declaration to the effect that they are the next reversioners: *Janaki Ammal v. Narayanasami Aiyer* (1).

De Gruyther, K.C., and *J. M. Parikh*, for the respondents were not called upon.

The judgment of their Lordships was delivered by

Lord Parker of Waddington.—Their Lordships do not consider it necessary to call upon counsel for the respondents in this appeal.

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The question is a very short one. It appears that the High Court from which the appeal has been brought has made a certain

(1) (1916) L. R. 43 I. A. 207; 24 C. L. J. 309; I. L. R. 39 Mad. 634.

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declaration. There is absolutely no ground for saying that that declaration is in any way erroneous, nor has counsel for the appellant suggested any error. The point is simply whether, under the practice prevalent in India, such a declaration ought to have been made. In order to show that no declaration ought to have been made, reference has been made to various cases, and in particular to the case of *Janaki Ammal v. Narayanasami Aiyer* (1). The point of that case is this: There was a Hindu widow entitled to an estate, and a suit was brought by a person, presumptively entitled as heir after her death, to prevent waste. It was held that there was no waste at all, and the question arose whether, under those circumstances, it was proper to give the persons presumptively entitled a declaration of their title as presumptive, or as sometimes called reversionary, heirs, and it was held by this Board that no such declaration ought to be made. It is said that this case is analogous to that, and that no declaration ought to have been made. On the other hand, if section 42 of the Specific Relief Act, 1877, is referred to, it will be seen that one of the illustrations given is this: "The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime."

It appears to their Lordships to be clear on this section that where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed. The declaration here is simply confined to that. It is a declaration that a certain deed which was executed by the Hindu widow in possession, and purporting to confer the absolute estate in the property on one of the reversionary heirs, is not binding on the other reversionary heirs. It was intended that this deed should operate to confer the whole interest on the grantee, on the footing that the other reversionary heirs being of the half blood only, could not come in in competition with the grantee, and the real question in the suit, as far as their Lordships can make out, was simply whether the claimants were claimants of the half blood or of the whole blood, and it was decided by both Courts that they were not of the half blood, but of the whole blood.

Under these circumstances, it appears to their Lordships that

this is an exact illustration of that which section 42 of the Specific Relief Act was meant to provide for. It is quite true that it involves a finding that the appellant in this case is a reversionary heir, but that must always be the case where a declaration is made following the illustration (e) of the section, because it is only in virtue of the persons claiming the declaration being reversionary heirs, and therefore presumptively entitled, that the declaration is made.

Under these circumstances, their Lordships can see no possible ground for interfering with the decree of the High Court, and the appeal therefore should be dismissed with costs. Their Lordships will tender their humble advice to His Majesty accordingly.

T. L. Wilson & Co :—Solicitors for the Appellant.

E. Dalgado :—Solicitor for the Respondents 1 & 2.

J. M. P.

Appeal dismissed.

PRESENT: *Lord Dunedin, Lord Shaw, Lord Sumner, Sir John Edge and Mr. Ameer Ali.*

THAKUR SRI SRI RADHA KRISHNA CHANDERJI

v.

RAM BAHADUR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL.]

Limitation—Adverse possession—Symbolical possession when sufficient to interrupt adverse possession.

Symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution proceedings in which the symbolical possession was given.

Juggobundhu Mukherjee v. Ram Chander Bysack (1) approved and followed.

Appeal against a decree of the High Court at Calcutta (June 24, 1913) reversing a decree of the Additional Subordinate Judge of Monghyr (June 7, 1910).

The facts of the case are sufficiently stated in the judgment of their Lordships. The suit was brought by the plaintiffs-respondents to recover possession from the defendant-appellant of certain 150

(1) (1880) I. L. R. 5 Calc. 584 F. B.

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bighas of land. The defendant claimed that it was the absolute property of one Sheo Parkash Misser and the defendant as the purchaser of that interest was the absolute owner of the suit property. He also set up adverse possession and pleaded that the suit was barred by limitation. He stated that the sons of Sheo Parkash through whom the plaintiffs derived their title had no interest in the land in question. The Subordinate Judge decided both points in favour of the defendant and dismissed the suit; but the High Court reversed the decree of the Court below and decreed the suit. The High Court held that under the arrangement made by Sheo Parkash and referred to in the judgment of their Lordships, Sheo Parkash had only a life-interest in the land which on his death reverted to his sons. On the question of limitation, it held that symbolical possession was given to the plaintiffs in execution proceedings to which the defendant had been made a party, and consequently the suit was not barred by limitation as the plaintiffs' symbolical possession was sufficient to interrupt the defendant's adverse possession. The defendant thereupon appealed to His Majesty in Council.

Abdul Majid for the appellant: The sale to the defendant-appellant was of the right, title and interest of Sheo Parkash, and the defendant thus got a good title not only against Sheo Parkash but against his sons also, as their interest was liable for their father's debt and it was not necessary to make them parties to the suit. Mayne's Hindu Law, 8th ed., para. 321, and *Girdharee Lall v. Kantoo Lall* (1).

[Their Lordships intimated that as this point was not taken in the Courts below, it was not now open to the appellant.]

As to limitation, symbolical possession would not interrupt adverse possession; to do that, actual possession was necessary.

[Mr. Ameer Ali referred to *Juggobundhoo Mukerjee v. Ram Chandra Bysack* (2).]

That case and the case of *Joggobundhu Mitter v. Purnanund Gossami* (3), on which the High Court relied, refer to lands in the occupation of tenants, as to which symbolical possession was the only possession possible. The case here is different, and those cases do not apply. Symbolical possession is not equivalent to real possession under the Code of Civil Procedure except where the Code expressly or by implication provides that it shall have that effect: *Mahadeo Sakhararam Parkar v. Janu Namji Hatle* (4).

(1) (1874) L. R. 1 I. A. 321. (2) (1880) I. L. R. 5 Cal. 584 F. B.

(3) (1889) L. L. R. 16 Cal. 530 F. B.

(4) (1912) L. L. R. 36 Bom. 373 F. B.

The respondents did not appear.

The judgment of their Lordships was delivered by

Lord Sumner.—This was a suit to recover possession of 150 bighas of land in mouzah Nagdah, in the pergunnah of the same name and the district of Monghyr. The plaintiffs had acquired *inter alia* such right in that land as could be sold under a decree in favour of mortgagees against two members of a joint Hindoo family, named Rudra Parkash Misser and his younger brother, Dharam Parkash Misser, and they alleged this right to be the full title to the land. The principal defendant, an idol by his shebaita, who were in actual possession by their tenants, claimed in right of a judgment-creditor of the father of Rudra and Dharam, who had bought the land at an execution sale under his decree in 1883, and they alleged that the title thus derived from the father was better than any title that could be derived from his sons. They also relied on adverse possession. They proved that they had held the land by their tenants for many years before the suit, but the plaintiffs in reply alleged effective interruption of their possession within twelve years before the suit. The Subordinate Judge decided for and the High Court against the defendant; hence this appeal. The respondents did not appear at their Lordships' bar. There were other parties to the suit, but in substance none were interested except those above mentioned.

Pandit Babu Sheo Parkash Misser, who lived at Mirzapur Gobardhan, in the district of Monghyr, was the head of a joint Hindu family of zamindars, governed by the Mitakshara law, which was entitled to considerable property in Behar. In 1873 he executed what has been called, somewhat loosely, a deed of gift in favour of his only son, Pandit Babu Rudra Parkash Misser, then a child. There were other members of the family beside Sheo and Rudra. By this deed he recited that among other family properties there was an 8-anna share in mouzah Nagdah and he conveyed by gift to his son all his rights and interests in that and other properties, and then declared that—"400 rupees per month...shall continue to be paid to me...for defraying the expenses of the maintenance of me, the declarant, and for meeting my personal expenses, and, over and above that, 150 bighas of land by measurement, situate in mouzah Phulwaria, or in any other mouzah, shall remain in my possession and occupancy as zirat land, and the measurement and the demarcation of the boundaries thereof shall be made as soon as possible, and the said land shall be held by me in my possession as zirat without paying any rent therefor."

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There were other provisions, but it does not seem material to consider them on the present appeal.

No doubt so unusual a transaction might be called in question on various grounds. The appellant did, indeed, suggest that its object was to defeat and delay creditors, but, as such a point ought to have been made at the trial, so that the facts might have been investigated, their Lordships declined to entertain it.

The appellant in the proceedings below made this deed the basis of his claim of title, and as the respondents accepted it as valid in the Courts below, the only question which arises upon it for their Lordships is one of construction, namely, what was the interest in the 150 bighas which Sheo Parkash reserved to himself? It is not necessary to examine what precise right Sheo Parkash may have had, as head of a joint family, to make such an arrangement, although no separation of the family took place nor were its properties divided, or to create anew *zirat* land out of that, which had been theretofore merely part of the zamindari land of his family. In the view which their Lordships take it is sufficient to answer this one question. That interest continued no longer than his life, and determined when he died in 1893, leaving his two sons, Rudra Parkash and Dharam Parkash, him surviving. Subsequent events made the words "as *zirat* land" of some importance. Their Lordships think that on the true construction of these words, as used in this connection, they merely mean "for the personal use and maintenance of the declarant himself, without paying any rent therefor." As between ryot and zamindar, and sometimes as between the zamindar and the revenue authorities, questions as to *zirat* or *zarait* lands involve very different considerations. The present case, however, is not one which touches a ryot's claim to be protected against dispossession so long as his rent is paid, or a zamindar's claim to an abatement of *jumma* in respect of lands held by him for his maintenance as *zirat*. In this case the word is used merely to describe the kind of interest reserved to the grantor under this particular deed, and its interpretation does not affect the general law or custom as to *zirat* lands. The land was never in fact cultivated by Sheo Parkash nor had it ever been recognised by village usage as his private land. The deed reserves a certain area, to be thereafter particularly set out, for the declarant's occupation, rent free, as part provision for his personal maintenance, his sons and other dependants being otherwise provided for under the general disposition of the family properties made by the deed. So used, the term "*zirat*" ceased to be a description truly applicable to these

lands after the death of the declarant, nor could third parties, who were entitled to his rights alone, found upon this word any claim to rights in the land, which he could never have enjoyed. With the determination of his interest this land would again form part of the general zamindari property of the undivided family. During the lifetime of Sheo Parkash the interest of his son Rudra in the 150 Bighas would be a vested zamindari interest in reversion. On the father's death the suspension of his right as zamindar to collect rents from the tenants of it would terminate, and, as manager and head of the joint family, he would possess and enjoy this parcel in like manner as the rest of the family property. Such upon the argument presented to their Lordships appears to be the true effect of this deed.

That the interest of Sheo Parkash, *tale quale*, was validly assignable has not been contested, and their Lordships will assume it to be so for present purposes. Some years after he executed his deed Sheo Parkash was sued for debt by the predecessors in title of the present appellant. For what the debt was contracted or when does not appear. A decree was obtained, and in execution proceedings his right to the 150 bighas was sold in 1883 to the decree-holders. They then claimed to have this area delimited and obtained an order in 1886, which was duly executed in 1888, that a sufficient area of land fit for khudkhast should be set out. To these proceedings Rudra Parkash and Dharam Parkash were made defendants. Evidently Sheo Parkash had not asserted his right to have this land set apart for his use, and probably, as was stated below but not proved, he had received money payments, which had made any demarcation unnecessary. Clearly there was no partition by the family. The decree-holders in 1886 got possession of the 150 bighas as if they had been in the occupation of Sheo Parkash and for his interest therein, whatever it might be. Doubtless they supposed that interest to have been absolute, and the family may have thought so too, but the point does not seem to have been raised. Subject to the question of dispossession in 1898, they have enjoyed the rents of it ever since. A series of zarpeshgi pattahs, mustajiri pattahs, and kabuliyats was produced, and sufficiently established the case.

Before their Lordships the appellant took this new point. Even if the interest of Sheo Parkash in the land, which was sold in execution, determined with his life, it was said that the interest of his sons must be deemed to have been sold too, for the ancestral property in a joint Hindu family may be made liable for the father's debts, unless they can be shown to have been for an illegal or immoral considera-

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tion. Such rules, however, do not always apply. The creditor's conduct, for example, may evidence his intention not to resort to such a right, whereby, after all, one man's property is taken to pay another man's debt. This is peculiarly so where the form of his proceedings points to an election to seek execution against his own debtor's interest, and no further. In the present case there is strong evidence of such an intention. The certificate of sale, moreover, dated the 10th January, 1884, recites that the decree-holder, Krishna Mohan Ghatak, has brought "the right and interest of the judgment-debtor, Sheo Parkash Misser, to be allotted by division, namely, by a separate allotment of 150 bighas of land . . . for the purpose of cultivation." It does not appear that he claimed execution at any time against the family property generally. The whole of the facts should have been investigated at the trial. Certainly their Lordships ought not to decide upon a general claim of right, now first raised, when there appears to be, to say the least of it, a *prima facie* answer, which might have been completely made out if the appellant had raised the contention in the Courts below. They are of opinion that such an argument is no longer open to him.

In 1889 while Sheo Parkash was still alive, his two sons mortgaged the family estate, including their share in mouzah Nagdah, to the predecessors in title of the present plaintiffs. After his death the mortgagees took proceedings to enforce the mortgage, and, among others, made the predecessors of the present defendants parties to them. In due course a decree was obtained, and upon the application for a sale in execution, it was asked that the order should apply to the mortgaged properties "with the zariat lands" (*mai arazi sirat*). On a formal objection being taken to the addition of these words by the predecessors of the present appellant, it was held that the Court was bound to sell the mortgaged property as described in the mortgage bond without addition. The order thereupon made must be construed as if it applied only to "Nagdah, original with dependency, all the zamindar's rights, together with the tolas known by district names or otherwise," following the language of the mortgage. The sale accordingly took place and the mortgagees were the purchasers. They received a sale certificate that they were entitled to "all the zamindari rights in 8 annas pucca of mouzah Nagdah," and, the land being in occupation by cultivating tenants under an apparently *bona fide* title, they received formal possession as usual after due proclamation by beat of drum in 1898.

This interruption, if such it was, of the defendants' actual posses-

sion was not of long duration. Hence the necessity for the present suit. Hence also the defence of adverse possession for more than twelve years before the suit began. The Subordinate Judge held that in fact the symbolical possession, given under the circumstances mentioned, did not apply to the 150 bighas. He constructed the order as if it had expressly excluded them, because of the deletion from the proposed order of the words "*mai arazi sirat*" Their Lordships think that this cannot be sustained. The true construction of the decree depends on what the Court actually ordered, not on what it refused to order. The order for possession applied to the 150 bighas because, following the description of the mortgaged lands, it extended to the lands in which the mortgagors, as zamindars and members of the undivided family, had a reversionary zamindari right, albeit subject to the interest which Sheo Parkash retained for his life.

In the High Court and before their Lordships it was further argued that symbolical possession would not avail against the defendants, but that only actual dispossession would interrupt their adverse possession. The High Court, following a decision of the Full Bench in *Juggobundhu Mukerjee v. Ram Chandra Bysack* (1), held that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given. This decision is one of long standing, and has been followed for many years. Their Lordships see no reason to question it or to hold that this rule of procedure should now be altered. In the result the appeal fails, and their Lordships will humbly advise His Majesty that it ought to be dismissed with such costs as have been incurred by the respondents in entering their appearance.

Truefitt and Francis :—Solicitors for the Appellant.

T. L. Wilson & Co. :—Solicitors for the Respondents.

J. M. P.

Appeal dismissed.

(1) (1880) I. L. R. 5² Calc. 584 (F. B.).

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APPELLATE CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir
Asutosh Mookerjee, Knight, Judge.*

SARAT CHANDRA DUTTA

v.

JADAB CHANDRA GOSWAMI.*

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1916.

May, 23.

Transfer of Property Act (IV of 1882), Sec. 107—Lease—Tenancy-at-will—Tenancy from year to year—Rent reserved—Term of tenancy—Oral evidence.

Per Curiam : Section 107 of the Transfer of Property Act does not lay down that a lease of immovable property can be made only by a registered instrument. The section says that a lease of immovable property in three cases viz in the cases of (a) a lease from year to year, (b) a lease for any term exceeding one year, and (c) a lease reserving a yearly rent, can be made only by a registered instrument. A tenancy-at-will can be created verbally.

Per Mookerjee, J : The fact that the rent is reserved at so much a year, does not conclusively show that the tenancy is from year to year: *Durgi v. Goberdhan* (1); and *Gobinda v. Dwarka Nath* (2) referred to.

The terms of a tenancy which does not come within section 107 of the Transfer of Property Act, can be proved by oral evidence: *Surabh v. Sophia* (3); *Fazel v. Keramuddi* (4); *Sita Nath v. Kartick* (5) and *Venkatagiri v. Raghuva* (6) referred to.

Appeal by the Defendant.

Suit for rent.

The primary Court decreed the suit; that decree was reversed on appeal. The decree of the primary Court was upheld on second appeal by the following judgment of

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February, 1.

Mullick, J.—The plaintiff sues the defendant for the rents of the years 1314 to 1317. The defendant denies the relationship of landlord and tenant. The land is situated in the Pabna Municipality and the case is therefore governed by the Transfer of Property Act. The plaintiff bases his claim on an oral agreement of tenancy. It is admitted that under section 107 of Transfer of Property Act the tenancy could not have been created without a

*Letters Patent Appeal No. 27 of 1915, against the decision of Mr. Justice Mullick, dated the 1st February, 1915, in Appeal from Appellate Decree No. 2885 of 1912, against the decree of Babu Surendra Nath Ghosh, Subordinate Judge of Pabna, dated the 15th August 1912, reversing that of Babu Phani Bhusan Banerjee, Additional Munsiff of Pabna, dated the 22nd April, 1912.

(1) (1914) 20 C. L. J. 448.

(3) (1895) 1 C. W. N. 248.

(5) (1900) 8 C. W. N. 434.

(2) (1914) 20 C. L. J. 455.

(4) (1902) 6 C. W. N. 916.

(6) (1885) I. L. R. 9 Mad. 142.

lease, but the learned Munsiff finding that the tenancy is established by an *ex parte* rent decree and by the admission of the defendant himself in a previous suit, has decreed the claim. On appeal the learned Subordinate Judge was of opinion that the tenancy could not be proved except by an instrument and that a suit for rent was not maintainable and further that no damages for use and occupation could be decreed as they were not specifically claimed. The suit having been dismissed the plaintiff prefers this second appeal.

It is quite clear that although there is no registered instrument it is open to the plaintiff to prove by other evidence the fact of the tenancy. The learned Subordinate Judge finds that the evidence adduced would prove a tenancy if it were admissible.

In these circumstances it is unnecessary to remand the case. The tenancy being established the question is what rent should be paid. The previous rent decree does not work an estoppel, but it is evidence of the amount payable. On the other hand the defendant has given no evidence to show that he is not liable to pay this amount. I think the learned Munsiff's decree is correct.

With regard to the claim for 1314 which has been held to be barred by limitation there is no cross appeal. The result is that the decree of the learned Subordinate Judge is set aside and that of the learned Munsiff restored. The appeal is decreed with costs.

Against this decision, the defendant appealed under clause 15 of the Letters Patent.

Babus Mohini Mohan Chuckerbutty and Abinash Chandra Chuckerbutty for the Appellants.

Dr. Dwarka Nath Mitter and Babu Baikantha Nath Mitter for the Respondent.

The judgments of the Court were as follows :

Sanderson, C. J.—In this case I think this appeal should be dismissed. It is clear that on the merits the defendant has no case whatever. The learned Munsiff in the Court below found that the story which the defendant set up was a shamelessly false one. Now the defendant tries to defend this action on a technicality based upon section 107 of the Transfer of Property Act. In my judgment his defence is without foundation: That section deals with certain classes of tenancy which are therein mentioned, namely, a tenancy from year to year, or for any term exceeding one year or reserving a yearly rent, and which can be made only by a registered instrument. It has not been shown, in this case that the tenancy in question which must now admittedly be taken to exist was one of

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Sanderson, C. J.

those mentioned in the section. On the other hand, the facts are as are set out by the learned Munsiff in his judgment. He said, "The defendant entered into the land as a tenant of the plaintiff, paid rent for it for a number of years, allowed a decree to be passed against him without any contest and admitted the tenancy in the defence he raised in Mahananda's suit. The parties have so long conducted themselves as landlord and tenant and I think that the defendant is estopped from questioning the validity of the settlement which has been acquiesced in and acted upon." These being the facts of the case, I think the judgment of Mr. Justice Mullick was right, and there is no reason for disturbing the judgment, and, this appeal should be dismissed with costs.

Mookerjee, J.—I agree that the judgment of Mr. Justice Mullick must be affirmed.

The contention of the appellant is based upon a misapprehension of the provisions of section 107 of the Transfer of Property Act. That section does not lay down that a lease of immovable property can be made only by a registered instrument; but the legislature has provided that a lease of immovable property in three specified cases can be made only by a registered instrument. These cases are first, a lease from year to year, secondly, a lease for any term exceeding one year, and, thirdly, a lease reserving a yearly rent. In the case before us, the plaintiff alleged that the defendant was a tenant-at-will, that, his holding was of a temporary character, was non-transferable and was liable to be terminated by notice to quit. The plaintiff also stated that the defendant had entered upon the land on these conditions and had agreed to pay rent at the rate of six rupees a year.

It is now contended that because there was an agreement to pay rent at the rate of Rs. 6 a year, the tenancy must be regarded as a tenancy from year to year. In my opinion, there is no foundation for this contention. As explained in *Durgi v. Goberdhan* (1), and *Gobinda v. Dwarka Nath* (2), the fact that the rent is reserved at so much a year does not conclusively show that the tenancy is from year to year. It is not the case of the plaintiff that the defendant holds under a tenancy from year to year; his case is that the defendant is a tenant-at-will, and a tenancy-at-will undoubtedly can be created verbally notwithstanding the provisions of section 107 of the Transfer of Property Act.

It was finally suggested that even if the defendant be a tenant-at-will, the terms of the tenancy can be established only by means of a

(1) (1914) 20 C. L. J. 448.

(2) (1914) 20 C. L. J. 455.

written lease and the amount of rent payable in respect of it, cannot be proved by oral evidence. There is no foundation for this argument. Numerous cases may be found in the books where it has been held that the terms of a tenancy which does not come within section 107 of the Transfer of Property Act can be proved by oral evidence : *Lala Surabh Narain Lal v. Catherine Sophia* (1); *Fazel Sheikh v. Keramuddi Sheikh* (2); *Sita Nath Pal v. Kartick Gharmi* (3); and *Venkatagiri Zamindar v. Raghava* (4).

A. T. M.

L. P. Appeal dismissed.

(1) (1896) 1 C. W. N. 248.

(2) (1902) 6 C. W. N. 916.

(3) (1900) 8 C. W. N. 434.

(4) (1885) 1 L. R. 9 Mad. 142.

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1916.

Sarat
v.
Jadab.*Mookerjee, J.**Before Mr. Justice Richardson and Mr. Justice Beachcroft.*

MONMOTHO NATH LAHA AND OTHERS

v.

ANNODA PROSAD ROY AND OTHERS.*

CIVIL.

1918.

January, 15, 16.

*Limitation—Limitation Act (IX of 1908), Secs. 6, 30, Sch. I, Art. 135—
Shebait—Suit to recover debutter property—Permanent lease—‘Transferred’—
Time, running of.*

A suit by a shebait in 1913, to recover possession of debutter property held by the defendant under a *matarrari* lease granted by a previous shebait in 1876, is barred by the provisions of Art. 134, Sch. I of the Limitation Act, as brought more than 12 years after the date of the lease.

Abhiram v. Shyama Charan (1); and *Sri Sri Ishwar Shyam Chand Jiu v. Ram Kanai* (2) explained.

The representation of an idol by shebait is a continuing representation and limitation runs against the idol continuously and not against each shebait individually as and when he succeeds to the office, the shebait not being holders of successive life estates in the management or in the property of the endowment.

Presunno Kumari v. Golab Chand Baboo (3); and *Jnanasambanda v. Velu Pandaram* (4) referred to.

* Appeal from Appellate Decree No. 2259 of 1915, against the decree of Babu Debendra Bejoy Bose, Subordinate Judge of Burdwan, dated the 28th May, 1915, affirming that of Babu Nani Gopal Mukerjee, Munsiff of Burdwan, dated the 30th March, 1914.

(1) (1909) L. R. 36 I. A. 148; 1 L. R. 36 Calc. 1003; 10 C. L. J. 284.

(2) (1910) L. R. 38 I. A. 76; 1 L. R. 38 Calc. 526.

(3) (1875) L. R. 2 I. A. 145; 14 B. L. R. 450; 23 W. R. 253.

(4) (1899) L. R. 27 I. A. 69; 1 L. R. 23 Mad. 271.

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The plaintiff had no vested right of suit when the Limitation Act of 1908 was passed.

If the passing of the Limitation Act of 1908 has cut down and made shorter the period of limitation, the plaintiff should have brought his suit within two years from the date of the passing of the said Act, under section 30.

Quære ; Whether section 6 controls section 30 of the Limitation Act.

Appeal by the Plaintiffs.

Suit for recovery of possession

The material facts and arguments appear from the judgment of Richardson, J.

Babus Biraj Mohan Mojumdar and Samarendra Kumar Dutt for the Appellants.

Babus Mohendra Nath Ray, Bepin Behary Ghose and Sajani Kanta Sinha for the Respondents.

The following judgments were delivered :

January, 16.

Richardsdon, J — The present appeal is preferred from the judgment and decree of the Subordinate Judge of Burdwan, dated the 28th May, 1915, affirming the decree of the Munsiff of Burdwan, dated the 30th March, 1914. The plaintiffs in the suit who are the appellants before us are the shebait of a certain idol and they sue the defendants to recover possession of certain debutter property held by them under colour of a Mokarari lease granted by the father of the plaintiffs, the previous shebait, in the year 1876. The sole question which arises is whether the suit which was instituted on the 14th February, 1913, is barred by the provisions of article 134 of the schedule of the Indian Limitation Act of 1908. By that article a suit to recover possession of immovable property conveyed or bequeathed in trust or mortgage and afterwards transferred by the trustee or mortgagee for a valuable consideration, must be brought within 12 years of the date of the transfer. *Prima facie* the present suit falls within the article and having been brought more than 12 years after the date of the lease to the defendants is out of time. The Courts below have so held.

It has been contended on behalf of the plaintiffs that the transfer to the defendants having taken the form of a lease, the transfer is not a transfer within the meaning of article 134 and that article has no application. In support of this contention reliance has been placed upon the cases of *Abhiram Goswami v. Shyama Charan Nandi* (1), and *Sri Sri Ishwar Shyam Chand Jiu v. Ram Kanai*

(1) (1909) L. R. 36 L. A. 148 ; L. L. R. 36 Calc. 1003 ; 10 C. L. J. 284

Ghose (1). These cases however, were decided by the Judicial Committee under the Limitation Act of 1877, in Article 134 of which the word 'transferred' was not used. As the article then stood it applied only to properties "purchased" from the trustee or mortgagee and the period of limitation was 12 years from the date of the "purchase." It was held in *Abhiram Goswami's case* (2), that the word 'purchase' did not include a transfer by way of lease even though the lease was a permanent lease. As to the second of the two cases, if regard be had to the course which it took, it will be found to be in respect of the present law an authority rather in favour of the defendants than in favour of the plaintiffs. The judgment of this Court which was taken on appeal to the Privy Council was delivered in 1905 (3). This Court held that the word 'purchased' in article 134 of the Act of 1877 was as applicable to a permanent lease such as a patni lease as to an absolute conveyance, and in so doing adopted the view taken in an earlier case decided in 1896, the case of *Nilmony v. Jagabandhu* (4). On the first hearing of the appeal to the Privy Council, the appeal was dismissed and the decision of this Court was affirmed. An application was however subsequently made to their Lordships to review their judgment (5), and on review the decision of this Court was reversed in 1911 on the ground that it was, as regards the meaning of the word "purchased" inconsistent with *Abhiram Goswami's case* (2), which had been decided by their Lordships in 1909. As article 134 is now worded, it is impossible to say that a transfer by way of a permanent lease is not within its scope. Apart from the dates it might seem that the language was altered for the express purpose of avoiding the effect of the ruling in *Abhiram Goswami's case* (2). In fact it was apparently not intended to make any change in the law but only to state more clearly the law as it was at the time understood.

The further point taken that the plaintiffs had no cause of action till their father died is also untenable on the authorities. In *Madhu Sudan Mandal v. Radhika Prasanno Das* (6), the question was treated as concluded by the decision of the Privy Council in *Danodard Das v. Lakhan Das* (7). The representation of the idol by the shebait is a continuing representation, and limitation runs against the idol continuously and not as against each shebait individually

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(1) (1910) L. R. 38 I. A. 76 ; I. L. R. 38 Calc. 526.

(2) (1909) L. R. 36 I. A. 148.

(3) (1905) 2 C. L. J. 545.

(4) (1896) I. L. R. 23 Calc. 536.

(5) (1910) 14 C. W. N. ccxiv.

(6) (1912) 17 C. W. N. 873 ; 16 C. L. J. 349.

(7) (1910) L. R. 37 I. A. 147 ; I. L. R. 37 Calc. 885 ; 12 C. L. J. 110.

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as and when he succeeds to the office, the shebaitis not being holders of successive life-estates in the management or in the property of the endowment: *Prosunno Kumari Debya v. Golab Chand* (1); *Juanasambanda v. Velu* (2).

It has next been contended however that *Abhiram Goswami's* case (3), must be taken to have settled what the law was before the Limitation Act of 1908 was passed and that the plaintiffs therefore are entitled to say that they have been deprived of a right of suit which they had under the pre-existing law or that in some way they are entitled to treat the present suit as a suit not under article 134 but as a suit to which some other article applies. As the argument is put, in one aspect it is the last point over again, namely that the plaintiffs had no cause of action till their father died in 1912. Even if this were so, it is obvious that they had no vested right of suit when the Act of 1908 was passed. In another aspect the argument seems to be that their cause of action has at any rate been in some way changed. But if time ran against the idol, no change of substance has occurred in respect of the cause of action. That still depends, as it did before, on the unlawful alienation of the property by the plaintiffs' father and even if the defendants had to prove adverse possession, adverse possession would run against the idol under the old law just as it would under the new law: *Nilmony v. Jagabandhu* (4); *Damodar Das v. Lakhani* (5). The gist of this part of the argument seems to be that the article of the Limitation Act applicable would previously have been article 144 and not article 134. But whether that be so or not the whole of the contentions based on the change in the law really come to this that the passing of the Act of 1908 has cut down and made shorter the period of limitation to which the plaintiffs would otherwise have been entitled. In such a state of things the relevant section of the Act, to which we must look, is section 30. That section provides that "Notwithstanding any thing therein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1877, may be instituted within the period of two years next after the passing of this Act, or within the period prescribed for such suit by the Indian Limitation Act, 1877, whichever period expires first." The Act of 1908 was passed on the 7th August of that year and the period of two years allowed by section 30 expired before the suit was instituted. There is no other

(1) (1875) L. R. 2 I. A. 145; 14 B. L. R. 450; 23 W. R. 253.

(2) (1899) L. R. 27 I. A. 69; I. L. R. 23 Mad. 271.

(3) (1909) L. R. 36 I. A. 148.

(4) (1896) I. L. R. 23 Calc. 536.

(5) (1910) L. R. 37 I. A. 147.

concession to which the plaintiffs are entitled and having regard to the law as it was understood to be in this country up to 1908, there is no hardship. •

As a last resort, it has been argued that, at any rate, the minor plaintiffs are entitled to an extension of time under the provisions of section 6 of the present Act. It may be doubted whether the provisions of section 6 control those of section 30. But the true answer to this argument seems to be that under the law as it now stands it must be taken that the time began to run in 1877 when the lease to the defendants was granted and that under section 9 of the Act the time having once begun to run no subsequent disability or inability to sue stops it.

For the reasons indicated I am of opinion that this appeal fails and must be dismissed with costs.

Beachcroft, J.—I agree.

A. T. M.

Appeal dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr.
Justice Beachcroft.*

MONI LAL SIL

v.

NEPAL CHANDRA PAL.*

CIVIL.

1917.

August, 22.

Indian Lunacy Act (IV of 1912), Sect. 3 (Cl 11, 6, —Wife's brother, if a relative—Wife's brother, if competent to apply for an inquisition order—Rules under the Act, if applicable to mofussil—Civil Procedure Code (Act V of 1908), applicability of.

A wife's brother is a "relative" within the meaning of section 63 of the Indian Lunacy Act and is competent to apply for an inquisition order.

The rules under the Act framed for the Original Side of the High Court for the Presidency towns cannot be and ought not to be extended to places outside it.

The provisions of the Civil Procedure Code apply to applications under this Act.

Appeal by the Defendant.

Application for an inquisition order under section 62 of the Indian Lunacy Act into the alleged lunacy of the appellant.

*Appeal from Original Order No. 242 of 1917 against the decision of S. K. Ghose Esq. District Judge of Hughli, dated the 16th June 1917.

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1917.

Moni Lal
v.
Nepal.

The respondent who was a brother-in-law (wife's brother) of the appellant Moni Lal, applied before the District Judge for an inquisition order on the ground that the appellant had become a lunatic for about 8 years and that his brother had been mismanaging the lunatic's estate and had been benefiting himself out of it and that the lunatic was incapable of managing his own estates. The application also prayed for the subsequent appointment of a manager to the lunatic's estate. The lower Court made an order for inquisition. Hence this appeal.

Dr. Dwarka Nath Mitter (with him *Babu Debendra Nath Mandal*) for the Appellant—The petition was defective as it was not supported by the duly verified certificates of the medical practitioners and by an affidavit of fitness of the proposed manager. (Vide Hechle's Rules framed under section 61 of the Indian Lunacy Act). On equitable principles the rules governing applications in the Original Side ought to govern the proceedings in the mofussil Courts. Refers to the remarks of Parsons C. J. in *Pransukhram v Bai Ladkar* (1). The petition further did not disclose a *prima facie* case of an insanity and no man would be safe if an application for inquisition could be made on flimsy materials. Referred to the remarks of Sir Richard Couch in *Babu Gunga Pershad Sahoo v. Musst. Wooma Koower* (2).

Further a wife's brother is not a person related by marriage to him. The words 'related by marriage' in section 3, clause 11 can only mean either the wife or the husband.

Babu Sasisekhar Bose for the Respondent :—Hechle's Rules were meant for the Original side of the High Court where English practice are followed in the absence of Indian statutes. The rules were framed under section 61 which is in Chapter IV of the Act which deals with lunacy proceedings in Presidency towns. There is no similar section giving power to frame rules in chapter V of the Act which deals with lunacy proceedings in the mofussil Courts. Hence the application was quite proper under the Civil Procedure Code.

The rules in the Original side ought not to be strictly applied in the mofussil. For if this is done the result will be that in many cases no application can be made from remote villages where it is often very difficult to find even one qualified medical practitioner, not to speak of two.

The petition does set out a *prima facie* case of insanity within the meaning of the ruling in *Babu Gunga Pershad Sahoo v. Musst. Wooma Koower* (2).

(1) (1899) I. L. R. 23 Bom. 653 (655).

(2) (1872) 18 W. R. 326.

The word 'relative' in section 3, clause 11 includes persons other than the wife or the husband and can include the father or the brother of the wife. A narrow construction of the word 'relative' would be disastrous for Indian women who generally depend upon their father or brothers for help in such difficult circumstances as the present one.

The judgment of the Court was delivered by

Mookerjee, J.—This appeal is directed against an order for inquisition made under the Lunacy Act, 1912. The proceedings were initiated on an application presented on the 27th March, 1917, by one Nepal Chandra Pal, who stated that the husband of his sister Mani Lal Seal, was a lunatic and that it was necessary to take proceedings under the Lunacy Act for the care of his person and for the management of his estate. The petition was duly verified by Nepal Chandra Pal who affirmed the truth of the statements material for the institution of the proceedings. The District Judge, notwithstanding the opposition of the lunatic and his brother, has directed an inquisition. That order has been assailed before us on the ground that the application should not have been at all entertained. Two questions, consequently require consideration; namely, first, whether the petitioner was competent to present the application, and, secondly, whether the District Judge could take action on the verified petition presented to him.

As regards the first question, we observe that under section 63 of the Lunacy Act, 1912, an application for inquisition under section 62 may be made by any relative of the alleged lunatic, or by any public curator appointed under the Succession (Property Protection) Act, 1841, or by the Government Pleader, as defined in the Code of Civil Procedure, 1908, or, if the property of the alleged lunatic consists in whole or in part of land or any interest in land, by the Collector of the district in which it is situate. The term "relative," as defined in clause (11) of section 3, includes any person related by blood, marriage or adoption. The brother of the wife must, we think, be deemed a "relative" within the meaning of this clause; he is plainly related by marriage to the husband of his sister, and it would not be right to restrict the term only to the husband or the wife. A question may hereafter possibly arise, what limitation, if any, should be placed on the term in a case of this description; it is not necessary for our present purpose to consider, whether every blood relation of the wife is a relative of the husband within the meaning of section 3 (11). But we may observe that the cases in England seem to

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show that a narrow construction should not be placed upon the expression. Eldon, L. C. in *Exp. Ogle* (1), held that even a stranger may be permitted, in a proper case, without regard to his motive, to move the Lord Chancellor for the institution of a proceeding and the issue of an inquisition. A similar view was taken by Cottenham, L. C. in *Re Nesbitt* (2), where he laid down the qualification that even amongst people who are connected by blood, although the carriage of the proceedings should ordinarily be given to the nearest of kin, yet the carriage, in the case of a contest, might be given to the party who was most likely to bring out the whole truth. If the Indian Legislature had intended to put a restricted meaning upon the term "relative," the interpretation clause in section 341 of the English Lunacy Act, 1890, might well have been adopted, and it might have been stated that "the term 'relative' means lineal ancestors or lineal descendants of ancestors not more remote than great-grandfather and great-grand-mother." In our opinion, the brother-in-law was unquestionably a relative within the meaning of section 63 of the Lunacy Act, 1912.

As regards the second question, we have been pressed to hold that the application should not have been entertained by the District Judge, as it was not accompanied by two medical certificates such as are required in similar cases on the Original Side of this Court. It has been urged in substance that in the absence of rules applicable to cases outside the Presidency towns, the same procedure should be followed as has been prescribed by this Court for cases in Calcutta. We are unable to accept this contention as sound and reasonable. The Legislature deliberately made section 61 applicable only to cases in the Presidency towns. That section provides that the Court may, from time to time, make rules for the purpose of carrying into effect the provisions of Chapter IV in matters of lunacy. Under that section, this Court has framed a rule to the effect that every application on the Original Side should set out certain particulars and should be supported by duly verified certificates of at least two medical practitioners and by an application of the proposed guardian or manager. We are of opinion that this rule is not only not applicable to cases outside the Presidency towns, but that it should not be made applicable to such cases. It is conceivable that, in cases outside the Presidency towns, the production of two medical certificates of the kind mentioned may be impracticable in many instances. This is precisely a matter in which the conditions in the Presidency towns and in places outside

(1) (1808) 15 Ves. 112

(2) (1817) 2 Phill. 245.

are so widely different that it would be most unreasonable to hold that rules intended for the Presidency towns should be extended to places outside.

It may be pointed out that under section 141 of the Civil Procedure Code of 1908, the provisions of that Code are applicable to proceedings of this character; for that section lays down that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil Jurisdiction. That this is a proceeding in a Court of civil jurisdiction is clear from the fact, that the term District Court is defined in section 3 (3) as the principal civil Court of original jurisdiction in any area outside the local limits, for the time being, of the Presidency towns. This view was first taken by Sir Barnes Peacock, C. J. in the case of *Maharajah Jugunnath Sahu Deo v. Burra Lal Opendronath Sahu Deo* (1), and was followed in *Busrut Ali Chowdhry v. Eshan Chunder Roy* (2). Consequently, all applications for the initiation of proceedings under the Lunacy Act, 1912, must be verified in the same manner as is provided in the Code of Civil Procedure. This clearly furnishes a sufficient safeguard against the institution of vexatious or unfounded proceedings of the kind contemplated by Sir Richard Couch, C. J. in the case of *Gunga Pershad Sahoo v. Mussammat Wooma Kooer* (3). If a proceeding is sought to be instituted upon a verified application which contains statements untrue to the knowledge of the petitioner, criminal proceedings of a deterrent character may easily be adopted against him. In the present case, the application was duly verified, and the District Judge was competent to take proceedings on its basis.

The result is that the order of the Court below is affirmed and this appeal dismissed with costs. We assess the hearing-fee at one gold mohur.

B. B. M.

Appeal dismissed with costs.

(1) (1866) 5 W. R. Mis. 54

(2) (1867) 7 W. R. 267.

(3) (1872) 18 W. R. 326.

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Mookerjee, J.

Before Mr. Justice Fletcher and Mr. Justice Teunon.

BEPIN KRISHNA KUMAR AND OTHERS

v.

HARI DAS GHOSE AND OTHERS.*

CIVIL.

1916.

June, 23.

Suit, maintainability of—Tenant, status of—Settlement officer—Settlement of rents—Bengal Tenancy Act (VIII of 1885), Secs. 105 A, 109.

A Settlement Officer, when hearing an application for settlement of rent, has jurisdiction to enquire as to whether a tenant belongs to the class to which he was shown in the record-of-rights. It is not competent to a civil Court under section 109 of the Bengal Tenancy Act to enquire into the status of a tenant, which was the subject of enquiry before a Settlement Officer.

Appeal by the Defendants.

Suit for a declaration that the entry in the record-of-rights was wrong and that the plaintiffs (the tenants) were permanent tenants at a fixed rate and not settled raiyats as entered in the record.

The material facts appear from the judgment.

Babus Jyoti Prosad Sarbadhikary and Jogendra Nath Dutt for the Appellants.

Babus Hemendra Nath Sen and Jatindra Mohan Sen Gupta for the Respondents.

The judgments of the Court were as follows :

Fletcher, J—This is an appeal by the defendant against the judgment of the learned Subordinate Judge of Hooghly, dated the 17th December, 1913, affirming the decision of the Munsiff at Howrah. The suit was brought by the plaintiffs, the tenants, against the defendants, the landlords, for a declaration that the entry in the record-of-rights was wrong and that they were permanent tenants at a fixed rate and not settled raiyats as entered in the record. The record-of-rights in this case was finally published on the 29th October, 1907; that is, after the date on which Act I (B. C.) of 1907 came into force which amended the Bengal Tenancy Act by adding a new section, section 105 A. On the 29th November, 1907, an application was made by the landlords, the defendants, under the provisions of section 105 for settlement of a fair rent. On the 28th February, 1908, an order was passed settling a fair rent under which the rent of the tenants was somewhat enhanced. Then the tenants brought

* Appeal from Appellate Decree No. 710 of 1914, against the decree of Babu Baroda Prosad Roy, Subordinate Judge, 3rd Court, of Hooghly, dated the 17th December, 1913, affirming that of Babu Paroda Kinkar Mukerjee, Munsiff, 3rd Court, at Howrah, dated the 6th August, 1912.

the present suit. The only question is whether the present suit is maintainable. Before section 105 A came into force, the decisions of this Court show that, when the settlement officer was dealing with an application to settle a fair and equitable rent, he could not go behind the record-of-rights. He was bound to accept the entries that appeared there. That was the view which Mr. Justice Teunon and myself took in the case of *Sashi Bhusan Hasrav. Sheikh Eshular Ali* (1). It appears that the record in that case was finally published in the year 1903. It was clearly a case to which Act I (B.C.) of 1907 which enacted for the first time section 105A could not apply. But the present case must be dealt with reference to the new section that has been added by Act I (B.C.) of 1907. Now, section 105A was expressly enacted to meet the objection that had been raised in the cases referred to so as to enable the settlement officer who was hearing an application for settlement of rent to decide certain issues which the Court had held that he was not entitled to decide in an application under section 105. Amongst those issues which the Settlement Officer was authorised to decide by section 105A was issue No. (e) of that section, namely, whether the tenant belonged to a class different from that to which he was shown in the record-of-rights as belonging. That being so, it is quite clear that the settlement officer had in this case jurisdiction to enquire as to whether the tenants belonged to the class to which they were shown in the record-of-rights. The question is "did he so enquire"? It is quite clear that he did. The written statement set up a case that the rent was not liable to enhancement. The learned Settlement Officer by his decision decided that the rent was enhancible and ought to be enhanced. Therefore, he must have come to a definite and clear conclusion that the status of the tenants was one of tenants whose rent was liable to be enhanced. That being so, under section 109 of the Act, a civil Court is prohibited from entertaining any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 (both inclusive). That includes, of course, the new section 105A. It seems to me quite clear, on a reading of the new section along with section 109 that, in this case, the Settlement Officer having decided that the tenants were not tenants at fixed rates of rent but were liable to have their rents enhanced and their rents having been enhanced, it was not competent to the civil Court, having regard to the terms of section 109, to enter into and enquire what was the status of those tenants. That

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(1) (1915) 19 C.W. N. 636.

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being so, the judgment of the lower appellate Court is, in my opinion, wrong. We should, therefore, allow the appeal and dismiss the plaintiff's suit. The plaintiffs respondents must pay to the defendants appellants their costs in this Court as well as in the Courts below.

Teunon, J.—I agree.

Appeal allowed.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

SRIMATI PRIYA SAKHI DEBI

v.

BIRESHWAR SAMANTA AND OTHERS.*

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1916.

May, 23
June, 6.

Adverse possession—Simple mortgage—Subsequent adverse possession against mortgagor—Limitation Act (IX of 1908), Sec. 28—Mortgage suit, scope of.

Per Curiam : Where a simple mortgage has been executed by a person in possession, the subsequent dispossession of the mortgagor, though it may operate by lapse of time, under section 28 of the Limitation Act, to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the simple mortgagee.

Aimadar v. Makhan Lal (1) approved *Prannath v. Rookea* (2); and *Karan Singh v. Bakar Ali Khan* (3) distinguished.

Per Mookerjee J : The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper persons to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage: *Jaggeswar v. Bhudan* (4); and *Bhaja v. Ch'ni Lal* (5) referred to. Consequently a person who claims a title adverse to that of both the mortgagor and the mortgagee, should be discharged from the suit.

*Letters Patent Appeal No. 33 of 1915, against the decision of Mr. Justice Fletcher, dated the 3rd March, 1915, in Appeal from Appellate Decree No. 876 of 1913, against the decree of Babu Bijoy Gopal Bosu, Subordinate Judge, 2nd Court of Burdwan, dated the 3rd October, 1912 reversing that of Babu Achinta Nath Mitra Munsiff, 1st Court of Burdwan dated the 12th June, 1911.

(1) (1906) I. L. R. 33 Calc. 1015. (2) (1859) 7 M. I. A. 323.

(3) (1882) L. R. 9 I. A. 99; I. L. R. 5 All. 1.

(4) (1906) I. L. R. 33 Calc. 425; 3 C. L. J. 205.

(5) (1906) 5 C. L. J. 95.

° Appeal by the Plaintiff.

Suit to enforce a mortgage security.

The primary Court dismissed the suit as against defendant No. 3. who claimed adversely to the mortgagor. This decree was reversed on appeal. On second appeal the decree of the first Court was restored by the following judgment of

Fletcher, J—This is an appeal from a decision of the learned Subordinate Judge of Burdwan dated the 3rd October, 1912, reversing the decision of the Munsiff. The suit was brought to enforce a mortgage security and the only question that arises in the present appeal is the question of limitation and that question is whether when a mortgagor has been ousted from possession of the property the possession of a third party becomes adverse also as against the mortgagee. The view that has been taken by a Division Bench of this Court in the case of *Aimadar Mandal v. Makhan Lal Dey* (1) is that the possession in such a case would not be adverse against the mortgagee. That decision has been commented upon by Mr. Justice Mookerjee in his judgment in the case of *Nand Kumar Dobey v. Ajodhya Sahu* (2). The comments of the learned Judge will be found at p. 299. The case has been further observed upon and dissented from in judgment of the Madras High Court in the case of *Ramasami Chetti v. Ponna Padayachi* (3). Of course, if the case of *Aimadar Mandal v. Makhan Lal Dey* (1) stands by itself, I am bound by it and I must follow it here. But the learned Judges in that case seem to have over-looked several authorities that establish a contrary proposition. Those cases are the case of *Prannath Roy Chowdhury v. Rookea Begum* (4) (at p. 355 are the observation of their Lordships of the Judicial Committee where a different view was taken); the case of *Sheoumber Sahoo v. Bhowaneedeen Kulwar* (5). The other decisions are cited in the course of the judgment of Mr. Justice Abdur Rahim in the case, *Ramasami v. Ponna* (3). Then we have also got the decision of the Privy Council in the case of *Karan Singh v. Bakar Ali Khan* (6). That case seems to me when carefully looked at to be inconsistent with the case of *Aimadar Mandal v. Makhan Lal Dey* (1). It was assumed by the Privy Council in the case of *Karan Singh v. Bakar Ali Khan* (6) that in a case of dispossession by a third party there is no distinction between the positions of the mortgagor and the mortgagee. That seems to me clear upon reading the judgment. I think, having regard to the decisions of the

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(1) (1906) I. L. R. 33 Calc. 1015.

(2) (1911) 14 C. L. J. 292 (298 and 299).

(3) (1910) I. L. R. 36 Mad. 97.

(5) (1870) 2 N. W. P. H. C. R. 223.

(4) (1852) 7 Moore's L. A. 323.

(6) (1882) I. L. R. 5 All. 1.

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Privy Council, I am bound to follow the view taken in those cases. The clear finding of fact made by the Court of first instance is that the mortgagors of the plaintiff were ousted sometime in the year 1892. This suit was not brought till the 23rd August 1905. In that view, the present appellants must have been in possession adverse to the mortgagors of the plaintiff for more than twelve years prior to the institution of the suit, and, in my opinion, on a consideration of the decision of the Privy Council, that possession was also adverse to the plaintiff, the mortgagee of the defendants Nos. 1 and 2. That finding of fact by the Court of first instance has not been overruled or dissented from by the lower appellate Court. I think, therefore, that the judgment and decree passed by the lower appellate Court ought to be set aside and the decree of the Munsiff restored. The respondents will pay to the appellants their costs in all courts.

Against this decision, the plaintiff preferred an appeal under clause 15 of the Letters Patent.

Babus Mohendra Nath Ray and *Bepin Behari Ghose (Sr.)* for the Appellant.

Babus Ram Chandra Mozumdar and *Sarat Kumar Mitter* for the Respondents. C. A. V.

The judgments of the Court were as follows :

Sanderson, C. J.—This is an appeal by the plaintiff from the judgment of Mr. Justice Fletcher whereby he set aside the judgment and decree of the Subordinate Judge of Burdwan.

The action was brought to enforce a mortgage bond dated the 27th June, 1887, executed in favour of the plaintiff by the original defendants Nos. 1 and 2. Under the bond the principal was to be paid by instalments and it was provided that the whole amount remaining unpaid should become payable upon default in payment of any one of the instalments with interest at 2 per cent. per mensem. One of the instalments was not paid on 11th February, 1893 : there was, however, a payment of interest on 18th October, 1893, and the suit was brought on the 22nd August, 1905.

The dispute in this case relates to certain land which has been described as plot No. 1. It appears that on 16th February, 1874, this plot of land was sold by the then owners, called Mullick, to the predecessor-in-title of defendants Nos. 1 and 2, and that these defendants and their predecessors were in possession of the plot from that date until 1892.

On the 7th May, 1875, the Mullicks, although they had already sold the plot, purported to execute a mortgage of the said land in favour of defendant No. 3.

June, 6.

On the 27th June 1887, the defendants Nos. 1 and 2 (as already stated) mortgaged the plot to the plaintiff.

The defendant No. 3 brought a suit on his mortgage and on the 6th February, 1891, he obtained a decree. On the 7th December, 1891, at an auction, held in execution of the said decree, the defendant No. 3 purchased the said land and in 1892 obtained possession thereof and from that time up to the institution of this suit, on 22nd August, 1905, he remained in possession.

The defendant No. 3 having been made a party to this suit set up the defence that he had been in adverse possession of the said land for more than 12 years before the institution of this suit.

The case, having come up on appeal, two learned Judges of the High Court in a judgment of 23rd March, 1910, remanded it for the decision of this question as far as defendant No. 3 was concerned, whether the plaintiff was entitled to bring the said plot to sale as against defendant No. 3.

The Court of first instance decided against the plaintiff, the Subordinate Judge, however, held that the plaintiff was not made a party to the mortgage suit brought by the defendant No. 3 and consequently she was not bound by it. Further that if defendants Nos. 1 and 2, after executing the mortgage in favour of the plaintiff, had entered into any compromise with defendant No. 3 by which they relinquished their right to the said plot (upon which he came to no definite conclusion as to the facts) the plaintiff could not be bound thereby as she was no party to that proceeding; and finally that the possession of the defendant No. 3 could not be held to be adverse to the plaintiff before the time when she could enforce the mortgage and therefore the learned Judge decided in favour of the plaintiff.

The learned Judge Mr. Justice Fletcher held that the possession of the defendant No. 3 was adverse to the plaintiff and consequently he reversed the judgment of the Subordinate Judge and decided in favour of defendant No. 3.

The mortgage was a simple mortgage and it is to be noted that this suit was merely one for the realisation of the plaintiff's security; the plaintiff asked for a decree for the principal and interest due and a sale of the mortgaged property.

It was held by the Subordinate Judge when the case was first before the first appellate Court in his judgment of 4th May, 1907, that the suit was not barred, for although there had been default in the payment of an instalment in February, 1893, there had been a payment of interest on the 18th October, 1893, and that consequently under section 20 of the Limitation Act a fresh period of

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limitation should be computed from the time when the interest was paid and that the suit being instituted on 22nd August, 1905, was therefore in time.

This finding, so far as defendants Nos. 1 and 2 were concerned was affirmed by the High Court on 23rd March 1910.

The matter, therefore, in this appeal is between the plaintiff and defendant No. 3, for whom it was argued that the possession of defendant No. 3 was adverse to the mortgagors, defendants Nos. 1 and 2, and it must, therefore, be taken as adverse to the plaintiff, the mortgagee, and no decree for sale of the property should be made.

It was argued on behalf of the respondent (defendant No. 3) that this question between plaintiff and defendant No. 3 must be treated as if it were a claim by the plaintiff for possession of immovable property against defendant No. 3, and that, article 144 of the Limitation Act was applicable, that defendant's possession became adverse to the plaintiff in 1892, and as the suit was not brought until 22nd August 1905, the plaintiff's claim against defendant No. 3 is barred. Assuming that this article is applicable to this suit, the question remains, when did the possession of defendant No. 3 become adverse to the plaintiff?

In my judgment the term "adverse possession" implies that the person, against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins.

The mortgage in this case being a simple mortgage, the mortgagee was not entitled to demand possession of the property at the time the defendant No. 3 went into possession in 1892, and indeed the plaintiff has never yet become so entitled. Consequently in my judgment article 144, even if applicable, will not avail the defendant No. 3 to dispute the plaintiff's claim.

In my judgment the principle upon which this matter should be decided is that adverse possession affects the interest, and the interest only, which the person who was entitled to immediate possession had at that time, or in other words only the interest which the person, having the right to immediate possession, has in the property, when the adverse possession begins, can be affected by such adverse possession.

In this case the mortgage in favour of the plaintiff was created before the defendant No. 3 purchased the property at auction and obtained possession thereof in 1892. The position of the plaintiff, the mortgagee, then was that he had an interest in the property with

a right to bring it to sale for the realization of the mortgage debt, but with no right to take possession of the property. When, therefore, the defendant took possession of the property after the mortgage to the plaintiff, he took possession only of what belonged to the mortgagor, viz. his equity of redemption, and in my judgment held it subject to the liability of its being sold for the satisfaction of the mortgage debt.

This conclusion is in accordance with the decision of this Court in *Aimadar Mandal v. Makhan Lal Dey* (1), and the judgment of the Madras High Court in *Parthasarathy Naicken v. Lakshmana Naichar*, (2).

This last mentioned case though reported in 35 Mad. was later in date than *Ramasami Chetti v. Ponna Pa'ayachi* (3), which was one of the cases relied on by the learned Judge, and which has now been overruled by a Full Bench in *Vyapuri v. Sonamma* (4).

Karan Singh v. Bakar Ali Khan (5), which was considered by the learned Chief Justice in *Aimadar Man'al v. Makhan Lal Dey* (1), in my judgment, is not inconsistent therewith or with the principle above stated: for, in that case, if the defendant's contention had been maintained and he had been allowed to tack on to his own possession, the possession of the Collector, and treat that as possession on his own behalf and adverse, then his possession would have begun before the mortgage, and in such case the operation of the adverse possession would not have been affected by the subsequent grant of the mortgage security.

It was necessary, therefore, for the Privy Council to consider the question of tacking, and their Lordships did not decide that the possession of the defendant standing by itself should be considered adverse to the plaintiff.

Nor do I think that the decision in the case of *Prannath Roy Chowdry v. Rookea Begum* (6), another of the cases relied on for the respondent, covers the case now under consideration. For these reasons the appeal, in my judgment, should be allowed with the costs of both hearings in the High Court, the judgment of the learned Judge of the High Court should be set aside and the decree of the learned Subordinate Judge should be restored.

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(1) (1906) I. L. R. 33 Cal. 1015.

(2) (1911) I. L. R. 35 Mad. 231.

(3) (1910) I. L. R. 36 Mad. 97.

(4) (1915) 29 M. L. J. 645; I. L. R. 39 Mad. 811.

(5) (1882) I. L. R. 5 All. 1.

(6) (1859) 7 M. L. A. 323.

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Mookerjee, J.—I am of opinion that the judgment of Mr. Justice Fletcher cannot be supported.

The plaintiff seeks to enforce a mortgage security granted to her by the first defendant on the 27th June, 1887. The mortgage provided that, on default of payment of specified instalments, the entire mortgage money would become repayable with interest. As the result of such default, the mortgage money became recoverable on the 11th February, 1893. Thereafter interest was paid by the mortgagors on the 18th October, 1893. The present suit was instituted on the 22nd August, 1905. The claim was resisted by the third defendant, who had been joined as a party, because the plaintiff found him in possession of one of the properties comprised in the mortgage security. His contention in substance was that the mortgage had ceased to be operative upon the property in his hands. The trial Court decreed the claim in full, and this decision was affirmed by the Subordinate Judge on appeal. On a second appeal to this Court, the suit was remanded to the Court of first instance for retrial. That Court dismissed the suit in respect of the property held by the third defendant. This decision was reversed by the Subordinate Judge on appeal. Mr Justice Fletcher next set aside the decision of the Subordinate Judge and restored the decree of the primary Court. The plaintiff has preferred this appeal against the judgment of Mr. Justice Fletcher under clause 15 of the Letters Patent, and the question for determination is, whether what has been called the first property claimed by the third defendant is liable for the satisfaction of the mortgage debt. The circumstances under which that defendant claims title to the property may be briefly narrated. The property belonged originally to a family of Malliks who sold it to the Chaudhuris (the mortgagors of the plaintiff) on the 16th February 1874. Notwithstanding this sale, the Malliks mortgaged the property to the Samantas (now represented by the third defendant) on the 7th May, 1875. The Samantas sued in 1890 to enforce their security, obtained a decree for sale on the 6th February 1891, and, in due course, purchased the mortgaged property in execution on the 7th December 1891. In 1892, the third defendant as purchaser obtained delivery through Court, and dispossessed the first two defendants (the Chaudhuris) who had meanwhile, on the 27th June 1887, granted the simple mortgage in suit. The case for the third defendant is that his adverse possession of the property from 1892 had by 1904 extinguished the title of all persons interested therein whether as mortgagor or as mortgagee, and that, consequently, at the date of the institution of the present

suit on the 22nd August, 1905, there was no subsisting charge on the property in his hands. Mr. Justice Fletcher has given effect to this contention.

It is desirable to observe at the outset that the defence raised by the third defendant is not a question of the rule of limitation applicable to the suit. The suit is obviously in time under Art. 132 of the Indian Limitation Act read with section 20; it is a suit to enforce payment of money charged upon immovable property, and it has been instituted within 12 years from the date when interest was paid on the sum due. The question raised is in essence one of title; the substance of the defence is that the third defendant has by adverse possession for the statutory period acquired a title paramount to that of both the mortgagor and mortgagee. On principle such a question should not have been litigated in a mortgage suit. The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper person to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage: *Jaggiswar v. Bhuban Mohan* (1); *Bhaja Chowdhury v. Chuni Lal* (2). Consequently, the third defendant should have been discharged from this suit when he claimed a title adverse to that of both the mortgagor and the mortgagee. The parties, however, have deliberately adopted a different course, and the question in controversy has been raised and decided; both parties have in this Court expressed a desire that the matter in difference should be settled in this litigation which has now lasted for over 10 years. In these circumstances and in view of the qualifications to the general rule explained in the judgment in *Bhaja Chowdhury v. Chuni Lal* (2) it is competent to this Court to determine, whether the third defendant holds the property free of the mortgage, in other words, whether the right of the mortgagee to appropriate the property to the satisfaction of his debt no longer exists. As there has been much divergence of judicial opinion on this topic, it is desirable to investigate it in the first instance as a question of principle apart from authorities.

Section 58 of the Transfer of Property Act defines a mortgage as the transfer of an interest in specific immovable property. Consequently, when the owner of a property executes a simple mortgage thereof, the entire interest originally vested in him is thereafter vested partly in him as the mortgagor and partly in the mortgagee. A

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(1) (1906) I. L. R. 33 Calc. 425; 3 C. L. J. 205.

(2) (1906) 5 C. L. J. 95.

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simple mortgagee as such is not entitled under the Transfer of Property Act to take possession of the mortgaged premises; he holds the property as security for the loan while the mortgagor continues in possession thereof: *Papamma v. Vira Pratapa* (1). If, then, after the grant of the simple mortgage, the mortgagor is dispossessed, what is the effect of the possession of the adverse holder upon the title, first, of the mortgagor, and, secondly, of the mortgagee? The answer depends obviously upon the true construction of section 28 of the Indian Limitation Act which is in these terms: "At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." It is plain that this section which prescribes a rule for extinguishment of right to property is expressly limited to suits for possession; it has accordingly been held that in respect of debts, the provisions of the Limitation Act merely bar the remedy, but do not extinguish the right: *Nursing v. Hurryhur* (2); *Mohesh v. Busunt* (3). Consequently when the mortgagor in possession is dispossessed he must, under article 142 institute a suit for recovery of possession against the trespasser within 12 years from the date of dispossession; if he does not institute such a suit, his right to the property is extinguished. But what is his right to the property? Clearly, the equity of redemption which is all that remains in him after he has executed the simple mortgage, and which is all that he had when the adverse possession commenced against him. From this, it follows that after the lapse of the statutory period for the institution of a suit for possession, his equity of redemption, and, *prima facie*, nothing more, becomes vested in the adverse possessor, for, as pointed out in *Gossain v. Issur* (4); *Jagrani v. Ganeshi* (5); *Nand Kumar v. Ajodhya* (6), the practical effect of section 28, when a person suffers his right to be barred by the law of limitation is the extinction of his title in favour of the party in possession. The question next arises, what is the effect, if any, on the title of the simple mortgagee produced by the dispossession of the mortgagor? Does section 28 extinguish his interest? Obviously, the answer is in the negative. The simple mortgagee is not competent to institute a suit for possession of the property, because admittedly he is not entitled to possession either under the statute or under the contract. Section 28 clearly contemplates that the person whose right is

(1) (1896) L. R. 23 I. A. 32; I. L. R. 19 Mad. 249 (252).

(2) (1880) I. L. R. 5 Calc. 897.

(3) (1880) I. L. R. 6 Calc. 340.

(4) (1877) I. L. R. 3 Calc. 224.

(5) (1881) I. L. R. 3 All. 435.

(6) (1911) 14 C. L. J. 292 (298, 299).

extinguished by lapse of time is a person entitled to institute a suit for possession of the property. Consequently, the dispossession of the mortgagor does not extinguish the title of the mortgagee by lapse of time under section 28 of the Indian Limitation Act, and our attention has not been invited to any other statutory provision which is applicable to the present case and which operates to extinguish interests in land. The true effect of a statute of limitation is lucidly stated by Angell: "The principle on which the Statute of Limitation is predicated is not that the party in whose favour it is invoked, has set up an adverse claim for the period specified, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which, having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted and consequently his rights are unaffected by Statute." Angell on Limitation, page 398. The question of the extinction of an incorporeal right by adverse possession thus presents considerable difficulties: *Lakshmi Narayana v. Ulagammal* (1), and I am not prepared to accept the view indicated by Subramaniya Iyer, J. in *Nalla Muttu v. Betha* (2), where, however, the adverse possession had commenced before the date of the mortgage. The broad proposition that a hypothecation right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor, was sought to be supported from the following passage of the Code [C. 7, 36, 1,]; "Long standing silence, supported by regular limitation, renders nugatory the action for creditors taking proceedings for their pledge, unless the debtors or those who have entered into their rights, command possession of the security." [Salkowsky's Roman Law, Tr. Whitfield 503; Mackeldy's Roman Law, Tr. Dropsie 287]. But it must be remembered that in later Roman Law, in the case of a pignus as in that of a hypotheca, the mortgagee was entitled to possession of the mortgaged property, in the former at the time of the transaction, in the latter when the debt became due. [Salkowsky 485; Mackeldy 285; Hunter 436, 447.] This, however, is not the position of a simple mortgagee under the Transfer of Property Act: [*Pafanna v. Ramachandra* (3)]. On principle, accordingly, it is

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(1) (1914) 28 M. L. J. 256.

(2) (1899) I. L. R. 23 Mad. 37.

(3) (1896) L. R. 23 I. A. 32, I. L. R. 19 Mad. 249 (252).

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fairly plain that where a simple mortgage has been executed by a person in possession, the subsequent dispossession of the mortgagor, though it may operate by lapse of time, under section 28, to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the mortgagee who is not entitled to possession of the mortgaged premises either under the statute or under the contract. This is substantially the view taken in *Aimadar v. Makhan Lal* (1). Mr. Justice Fletcher, however, has declined to follow the rule laid down in that decision, on the ground that it is inconsistent with two decisions of the Judicial Committee, namely, *Prannath v. Rookea* (2), and *Karan Singh v. Bakar Ali* (3). The respondent has endeavoured to support the decision of Mr. Justice Fletcher by a three-fold argument, namely, first, that the rule laid down in *Aimadar v. Makhan Lal* (1), is inconsistent with the decision of the Judicial Committee just mentioned and cannot consequently be treated as good law, secondly, that it is in conflict with the earlier decision of this Court in *Ram Coomar v. Prosunno* (4), and consequently a reference to a Full Bench is unavoidable under the rules of Court; and, thirdly, that there is weighty judicial opinions in support of this view, for instance, *Ramasami v. Ponna* (5). In my opinion these contentions cannot prevail.

As regards the first branch of this contention, I am of opinion that neither of the two decisions of the Judicial Committee supports the contention of the respondent. In *Prannath v. Rookea* (2) the plaintiff, a mortgagee by conditional sale, had obtained a foreclosure order in proceedings instituted under Regulation XVII of 1806. He then sued to recover possession of the properties as owner from the defendant who claimed under a purchase from the mortgagor which was neither proved nor admitted. The question was raised, whether the plaintiff had validly foreclosed the mortgage by conditional sale so as to entitle him to bring ejectment as owner, as the proceedings for foreclosure were taken more than 12 years after the due date for the repayment of the mortgage money. The law of limitation then in force was contained in section 14 of regulation III of 1793, whereby a suit was barred where the cause of action had arisen 12 years before any suit was commenced on account of it. Lord Kingsdown pointed out that a suit for foreclosure against the mortgagor or against persons claiming privity with the mortgagor might not be

(1) (1906) I. L. R. 33 Calc. 1015.

(2) (1859) 7 M. I. A. 323 (355).

(3) (1882) I. L. R. 5 All. 1.

(4) (1864) W. R. (Gap). 375.

(5) (1910) I. L. R. 36 Mad. 97; 21 M. L. J. 397.

barred, while a suit for possession against a stranger who claimed to hold the property free of any mortgage might be barred; but he did not say that the mortgagee's right might be barred by the possession of an adverse claimant even if the mortgagee's right to possession had not accrued or where the mortgagee was not entitled to possession at all. It was not necessary to make such a pronouncement, because it was found that the possession of the claimant had been originally not adverse to but consistent with the mortgage title, and there was nothing whatever to show that it became adverse at any time before 12 years preceding the institution of the foreclosure suit. On the other hand, there are passages in the judgments of James L. J. in *Anundo Moie v. Dhonendro* (1) and in *Brojonath v. Khelut Chunder* (2), which indicate that adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. The case of *Karan Singh v. Bakar Ali Khan* (3), also does not support the contention of the respondent. There the Collector had, for protection of the Government revenue, taken possession of the property in 1861, pending the settlement of disputes between rival claimants. The mortgages were executed in 1862 on behalf of one set of claimants, namely, the daughter's sons of the last male owner. In 1863, by an award of arbitrators, the title of the defendant, who was the brother's grandson of the late owner, was established against the daughter's sons. The mortgagee was not a party to these proceedings and was not bound thereby. The Collector then made over possession of the property together with the arrears of income of the estate in his hands, to the successful claimant. In 1874, the mortgagee sued to enforce his securities. The defendant pleaded that he had been in adverse possession for the statutory period from 1861 on the assumption that the possession of the Collector was his possession. If this contention were well founded, the case would be, not that of the dispossession of a mortgagor after he had granted a simple mortgage, but that of the grant of a mortgage by a person previously dispossessed; in such a contingency, the adverse possession which had commenced to operate against the mortgagor would not, by the grant of the mortgage, be arrested, but would operate equally against the mortgagee, for in the words of Lord Kingsdown in *Prannath v. Rookea* (4) a cause of action is not prolonged by mere transfer of the title. The Judicial Committee, however, found

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(1) (1871) 14 M. L. A. 102 (111).

(2) (1871) 14 M. L. A. 134 (150).

(3) (1882) L. R. 9 I. A. 99; I. L. R. 5 All. 1.

(4) (1859) 7 M. L. A. 323 (355).

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that the defendant could not tack to his possession the possession of the Collector and had consequently not been in adverse possession for the statutory period since 1863. Sir Barnes Peacock observed, first, that the possession of the Collector was possession on behalf of the rightful owners; and secondly, that the rightful owners were the daughter's sons and not the brother's grandsons, as found in a proceeding of the arbitrators whose decision did not bind the plaintiff, as his bonds were prior to the submission to arbitration. I must decline to hold that the Judicial Committee by implication decided a question of law which was not argued before them and which, upon the pleadings and facts found, could not arise for consideration. There is no warrant whatever for the inference that the Judicial Committee assumed that a suit for sale by a simple mortgagee was a suit for possession. Sir Barnes Peacock expressly referred to the change in the law effected by the Limitation Act of 1871 and could not have held that a suit for sale was a suit for possession as might possibly have been held under the Limitation Act of 1859: *Surwan Hossain v. Golam Mahomed* (1); *Juneswar v. Mahabeer* (2); *Chetti v. Sundaram* (3). Under the present law, however, a suit for sale, such as the present, is in no sense a suit by a simple mortgagee, for possession of an interest in immovable property: *Vasudeva v. Srinivasa* (4). The Judicial Committee could hardly have overlooked the distinction between section 1, clause 12 of Act XIV of 1859 and Art. 145 of Act IX of 1871, the former of which they have characterised as an inartistically drawn statute and the latter as a more carefully drawn statute: *Maharana v. Dessai* (5); *Delhi and London Bank v. Orchard* (6). I think it is reasonably plain that the decisions of the Judicial Committee in *Prannath v. Rookea* (7) and *Karan Singh v. Bakar Ali* (8), do not conclude the question in controversy and do not directly or indirectly support the contention of the respondents.

As regards the second branch of the contention of the respondent, I am of opinion that the decision in *Ram Coomar v. Prosonno Coomar* (9) does not conflict with that in *Aimadar v.*

(1) (1868) 9 W. R. 170 (174).

(2) (1875) L. R. 3 I. A. 1; I. L. R. 1 Calc. 16.

(3) (1864) 2 Mad. H. C. R. 51.

(4) (1907) L. R. 34 I. A. 186; I. L. R. 30 Mad. 425; 6 C. L. J. 379.

(5) (1873) L. R. 1 I. A. 34; 13 B. L. R. 254.

(6) (1877) L. R. 4 I. A. 127; I. L. R. 3 Calc. 47.

(7) (1859) 7 M. I. A. 323.

(8) (1882) L. R. 9 I. A. 99.

(9) (1864) W. R. (Gap) 375.

Makhan Lal (1). The earlier case arose out of a suit by a mortgagee for possession after foreclosure and was decided under the Limitation Act^o of 1859. The provisions of that statute were, as I have just explained, radically different from those in the Limitation Act now in force, and that decision cannot be treated as an authority now binding upon us. I do not, however, decide that the case of *Ram Coomar v. Prosonno Coomar* (2), was correctly decided even under the law as it stood in 1859; indeed, it appears to me to be incapable of reconciliation with the principle deducible from the decision of the House of Lords in *Pugh v. Heath* (3), namely that on foreclosure, a fresh right of action arises for possession as owner; or, as it is said, the decree absolute gives a 'new right, confirms a new estate and thereby absolutely bars the statute of limitation. I cannot, consequently, accept the contention that the decision in *Ram Coomar v. Prosonno* (2), assists the respondent and the same observation applies to *Sheoumber v. Bhowanadeen* (4).

As regards the third branch of the contention of the respondent, it is indisputable that the balance of judicial opinion is in favour of the appellant. The earlier cases are reviewed in my judgment in the case of *Nand Kumar v. Ajodhya* (5) where the question was expressly left open for future consideration and need not be analysed afresh. It is sufficient to state that the conflict of judicial opinion in Madras, as indicated in *Parthasarathy v. Lakshman* (6), and *Ramasami v. Ponna* (7), has now been settled by a Full Bench in *Vyapuri v. Sonamma* (8), which upon an exhaustive examination of the question from various points of view, affirms the principle that the possession of the trespasser who has dispossessed a simple mortgagor is not adverse to the simple mortgagee [see also *Pereya v. Shunmuga* (9)]. The same view has been adopted in Allahabad: *Nandan Singh v. Jumman* (10); *Raj Nath v. Narain* (11). It is not necessary to consider the class of cases of which *Kanhoo Lal v. Monki Bibi* (12) and *Tarubai v. Venkatrao* (13), may be taken as the type where a question arose as to the effect of adverse possession against a mortgagee upon the

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(1) (1906) I. L. R. 33 Cal. 1015; 10 C. W. N. 904.

(2) (1864) W. R. (Gap). 375.

(3) (1882) 7 App. Cas. 235.

(4) (1870) 2 All. H. C. R. 223.

(5) (1911) 14 C. L. J. 292.

(6) (1911) I. L. R. 35 Mad. 231; 21 M. L. J. 466.

(7) (1910) I. L. R. 36 Mad. 97; 21 M. L. J. 397.

(8) (1915) 29 M. L. J. 645; I. L. R. 39 Mad. 811.

(9) (1913) I. L. R. 38 Mad. 903; 26 M. L. J. 140.

(10) (1912) I. L. R. 34 All. 640; 10 All. L. J. 278.

(11) (1914) I. L. R. 36 All. 567; 12 A. L. J. 982.

(12) (1902) 6 C. W. N. 601.

(13) (1902) I. L. R. 27 Bom. 43.

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title of the mortgagor; nor need we consider the law on the subject in England, which, as shown in *Nand Kumar v. Ajodhya* (1), does not support the contention of the respondent, and lays down in fact that a charge on the property can be enforced against a trespasser who has acquired a title by adverse possession. (See the judgment of Farwell, J. in *In re Nisbet & Pott's Contract* (2); *Ludbrook v. Ludbrook* (3).

I hold, accordingly, that this appeal must be allowed with costs, the decree of Mr. Justice Fletcher reversed and that of the Subordinate Judge restored.

A. T. M.

L. P. Appeal allowed.

(1) (1911) 14 C. L. J. 292.

(2) (1906, 1 Ch. 386.

(3) (1901) 2 K. B. 96.

CRIMINAL REVISION.

Before Sir Charles Chitty, Knight, Judge, and Mr. Justice Smither.

HARAI CHANDRA NANA

v.

OSMAN ALI.*

CRIMINAL.

1917.

December, 20.

Revision—Order of acquittal—Conviction by first Court—Appellate Court, reversal by—No discussing of evidence—Civil nature.

Where the trial Court has tried out a case on the merits and come to a conclusion that the accused was guilty of criminal trespass, it is not competent for a Court of appeal without going into the case or discussing the evidence or coming to any conclusion thereon, to acquit the accused on the ground that the matter is of a civil nature.

The High Court can in such a case, interfere with the order of acquittal.

Application for revision by the Complainant.

Revision under section 439 of the Code of Criminal Procedure.

* Criminal Revision No. 1293 of 1917, against the order of F. A. Sachse Esq., District Magistrate of Noakhali, dated the 1st October, 1917, acquitting the accused, who was convicted under section 447 Indian Penal Code by A. Rahman Esq., Sub-Deputy Magistrate of Sandip, dated the 30th August, 1917.

One Harai Chandra Nana (the complainant) purchased a plot of land belonging to Osman Ali in a sale on a mortgage decree. After execution sale he was in possession of a portion of the disputed land. The accused with some other men ousted him from possession.

The primary Court convicted the accused under section 447 of the Indian Penal Code and sentenced him to pay a fine of Rs. 20. On appeal, he was acquitted by the following judgment of the District Magistrate

"The complainant got possession from the Civil Court by symbolical possession, and it is not clear that all the persons accused of trespass and claiming to be in possession were parties. No preliminary inquiry and no local inquiry of any kind was made and the Court does not seem to have relied on any map or plan. In the circumstances I cannot be certain that the case was fully understood. Many documents were produced and the question at issue was distinctly complicated. Though the learned Magistrate may have been right in believing the prosecution witnesses instead of the defence witnesses, I think, it is a case where the complainant ought to have gone to the Civil Court and availed himself of the procedure laid down in Order XXI of the Code of Civil Procedure. I therefore acquit the accused. The fine, if paid, will be refunded."

Babu Hit Lal Guha for the Petitioner: The High Court can interfere in revision against an order for acquittal even at the instance of a private party under section 439, Criminal Procedure Code, more so in this case as the prosecution was started on my complaint and I was the prosecutor all along.

The claim set up by the accused is a purely *mala fide* one. The right set up must be a *bona fide* one i.e. more than a mere pretence.

Babu Manmathanath Mukherji for the Opposite Party: The Court has no jurisdiction to interfere against the order of acquittal: *Hrishikesh Mandal v. Abadhut Mandal* (1). On the merits also the complainant has no case against me. It is a pure case of civil dispute; further, complainant has suffered no loss.

Babu Hit Lal Guha in reply: *Hrishikesh Mandal v. Abadhut Mandal* (1), is distinguishable as I am only praying for a re-hearing of the appeal, as the judgment of the learned Magistrate is *prima facie* wrong.

The judgment of the Court was as follows:

In this case the learned District Magistrate on appeal acquitted the accused but without really going into the case or discussing the

(1) (1916) I. L. R. 44 Calc. 703.

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evidence or coming to any conclusion thereon. He says that the trying Magistrate may have been right in believing the prosecution witnesses instead of the defence witnesses, but, as he considered that it was a matter where the complainant ought to have gone to the civil Court and availed himself of the procedure laid down for civil Courts, he acquitted the accused. That was obviously not a good reason in a case where the matter had been tried out in the first Court and the Magistrate had come to the conclusion that the accused was guilty of criminal trespass. We accordingly set aside the order of acquittal on appeal and direct that the appeal be reheard.

A. T. M.

Retrial ordered.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

ABDUL ALI FAKIR AND ANOTHER

v.

NETALI FAKIR.*

CRIMINAL.

1911.

June, 17.

Theft—Landlord and tenant—Land, in the possession of the tenant—Trees belonging to the landlord—Kabuliat—Stipulation to pay compensation, if the tenant cuts trees—Trees cut by the tenant.

Where by the terms of the kabuliat it was provided that if the tenant cut any trees, he would pay to the landlord compensation at a certain rate, and it was found that the tenant *mala fide* cut some trees in order to injure the landlord:

Held, that although the tenant was in the possession of the land he committed theft by severing the trees from the ground, as they were in the possession of the landlord.

Emperor v. Sabai Sang (1) referred to.

Criminal Revision.

The material facts will appear sufficiently from the judgment.

Maulvi Mahammad Mustapha Khan for the Petitioners.

Mr. S. P. Sinha and *Babu Ramani Mohan Chatterjee* for the Opposite Party.

The judgment of the Court was as follows:

The substantial question in this Rule is whether on the facts found the offence of theft was committed.

The facts are that the petitioners cut down a large number of valuable fruit trees mango, jack, areca—on the land of one Jamir who it is said by the defence, had conveyed his right to the petitioners.

*Criminal Revision Case No. 593 of 1911.

(1) (1902) 4 Bom. L. R. 936.

June, 17.

In Jamir's kabuliat there is a clause to the effect that if he cut any trees he would pay to the landlord compensation at the rate of Rs. 10 per tree. It has been found that the petitioners, knowing this clause perfectly well, *mala fide*, cut the trees in order to injure the landlord.

There can be no question that cutting down a large number of valuable fruit trees is a wanton act and the question in the present case is whether it amounts to theft.

Now it is clear from explanation 1 to section 378, Indian Penal Code, that as soon as a tree is severed in order to the taking thereof, theft is committed; and it has been found that the petitioners severed these trees and removed some or all of them. They do not justify having cut down the trees. They say that they did not cut the trees and that if they did they had a right to. We take it that they did cut the trees. The question is whether they acted dishonestly.

The only reported case to which our attention has been drawn regarding the cutting down of trees is the case of *Emperor v. Sabal Sung* (1). There the subject matter of the charge was a *babul tree* and Aston, J. pointed out that to cut and remove such trees might be theft and was in that case to be regarded as theft because of the finding of dishonest intention of the accused person. It was held that the assertion of a *bona fide* belief in the claim set up by the accused ousts the jurisdiction of the criminal Court; but it cannot be said on the facts of the present case, that there was any such *bona fide* belief; rather the defence is a denial of cutting the trees and an assertion of claim to the land itself: But assuming that the land is in the possession of the petitioners that does not give them a right to cut the trees which are in the possession of the landlord; because the trees cannot be dealt with by the tenants without the permission of the landlord. This is clear from the clause in Jamir's kabuliat. The trees were wholly and solely in the possession of the landlord and it was theft to sever them from the ground, apart from any question of possession of the land itself.

We think, therefore, that the conviction is correct but, having regard to the dispute which exists between these parties, we think the ends of justice will be met by reducing the term of rigorous imprisonment to one of one month in the case of each of the petitioners. The fines will stand.

The Rule is discharged with this variation.

The petitioners will be remanded to jail.

A. N. R. C.

Order modified.

(1) (1902) 4 Bom. L. R. 936.

CRIMINAL.

1911.

Abdal Ali

vs.
Netali.

Before Sir Charles Chitty and Mr Justice Smither.

CRIMINAL.

1917.

December, 7.

ANANGA MOHAN DUTTA

v

THE KING-EMPEROR.*

Indian Penal Code (Act XLV of 1860), Sec. 182—Complaint to police—Suspecting a person, if amounts to false information.

Where a complainant in his complaint to the police suspected two persons as being implicated in a theft committed in his house :

Held that, having regard to the fact that there was a theft in his house, the complaint did not amount to giving false information within the meaning of section 182 of the Indian Penal Code, and the proceedings against the complainant under the section ought to be quashed.

Criminal Revision.

On the 30th July, 1917, the petitioner, Ananga Mohan Dutta, lodged a complaint to the Muradnagar police station to the effect that on the night of the 28th July, 1917, when he was at Comilla, about 24 miles off, a silver-mounted *hukka* was stolen from his *ghar* (hut) by some persons cutting open a 'mat wall, and that on his return home he was informed of the occurrence by the inmates of the house, and that he suspected two persons, one Asraf Ali and one Rafi Mahommad, of the same village as being implicated in the affair. The Sub-Inspector then went to the locality, and making some enquiries submitted a report to the effect that the case appeared to him to be an outcome of enmity, and prayed for institution of proceedings under section 182 of the Indian Penal Code against the complainant. On the 20th August, 1917, Mr. N Roy, the Sadar Sub-Divisional Magistrate of Comilla issued a notice upon the complainant to show cause why he should not be prosecuted, and the case was transferred to Moulvi Dalilar Rahaman, a first-class Deputy Magistrate, for disposal ; and the learned Deputy Magistrate, after considering the evidence passed an order granting sanction for the prosecution of the complainant, and submitted the records to the learned Sub-divisional officer for necessary action. The learned Sub-divisional officer revoked the sanction, and summoned the complainant under section 182 of the Indian Penal Code.

The complainant then moved the High Court for quashing the proceedings pending before the learned Sub-divisional Magistrate, and obtained the rule.

Babus Manmatha Nath Mukherjee and *Sasadhar Roy* (for *Babu Upendra-Kumar Roy*) for the Petitioner.

* Criminal Revision No. 1183 of 1917.

The judgment of the Court was as follows :

In this case a Rule has been issued to show cause why the prosecution of the petitioner under section 182, Indian Penal Code, should not be quashed. It appears that in his complaint the petitioner made no statement which can be said to be false. It is not denied that the *hukka* was stolen from his house. As to the person or persons who stole it all that he said in his complaint was that he suspected two persons. That does not amount to giving false information. The Rule is accordingly made absolute and the proceedings against the petitioner are quashed.

A. N. R. C.

Rule made absolute.

CRIMINAL

1917.

Ananga Mohan
v.
The King-Emperor.

PRIVY COUNCIL.

PRESENT: *Lord Buckmaster, Sir John Edge, Mr. Ameer Ali
and Sir Walter Phillimore.*

SRI SETHURAMASWAMIAR AND OTHERS

v.

SRI MERUSWAMIAR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT MADRAS.]

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1917.

July, 13, 16, 17.
October, 23.

Hindu Law—Grants for charitable purposes—Management of private and public charities—Devolution of management must be consistent with the purpose of the founder—Grants to the holder of an office for religious as well as non-religious purposes—Construction—Surrounding circumstances—Devolution—Partition—Impartibility of the headship of mutt—Jurisdiction of the Court to order a scheme for management.

With regard to the management of private charities, such as endowments for the support of the family idols, the law is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition, or in turn by the several heirs after partition: *Ramanathan Chetty v. Murugappa Chetty* (1) approved.

Quare, Whether this rule applies to public charities such as lands endowed for charitable purposes by a sovereign ruler: *Thandavaarya Pillai v. Shunmugam Pillai* (2), referred to.

(1) (1903) I. L. R. 27 Mad. 192, affirmed on appeal in L. R. 33 I. A. 139.

(2) (1908) I. L. R. 34 Mad. 167.

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But where a grant of land is made to the grantee for religious purposes and there is sufficient indication in the documents and in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowment, the management should not devolve on those heirs generally.

A Hindu sovereign granted certain lands to one S, his *guru*, some without condition and others for religious purposes. The original *guru's* descendants in regular succession filled his office and enjoyed or managed the properties. The Raj was escheated, but on the death of the last *guru*, (who was the first to have more than one son), leaving three sons, the eldest was installed as *guru* by the man claiming to be the adopted son of the late Rajah, and one of his younger brothers thereafter sued for a share in the non-religious properties and in the management of the religious properties :

Held, that as regards the non-religious lands there was nothing to take their descent out of the ordinary rule of inheritance, and that the plaintiff was entitled to a decree for partition thereof ; but that as regards the religious lands the documents and the surrounding circumstances sufficiently indicated the founder's intention that they should be administered by the *guru* as the head of the *mutt*, an office not divisible among the members of the family, and that being so, there was no jurisdiction in the Indian Court to settle the scheme, the only object of which would be to take away the sole power of management from the eldest son, and that the plaintiff's claim to share in the management must be dismissed : *Jafar v. Aji* (1) and *Trimbak v. Lakshman* (2) approved.

Sri Sethuramaswamiar v. Sri Meruswamiar (3) partly affirmed and partly reversed.

Appeal from a judgment of the High Court at Madras (August 18, 1909) affirming a judgment of the Court of the Subordinate Judge of Tanjore (December 11, 1906).

The facts of the case are sufficiently stated in the judgment of their Lordships, and also in the judgment of the High Court (3). The suit was brought by the first respondent against his elder brother (the appellant) and his younger brother (the second respondent) and others, on the allegations that the three brothers formed a joint Hindu family governed by the Mitakshara law, that the properties in suit were joint family properties, and that he was entitled on partition to one-third share of the joint family properties except those which were devoted to religious and charitable purposes in the management of which he was entitled equally with his two brothers. The appellant resisted the suit contending that succession to the properties in suit was governed by the rule of primogeniture, and that in any case he alone was entitled to manage the properties devoted to religious and charitable purposes. The Subordinate

(1) (1864) 2 Mad. H. C. R. 19.

(2) (1895) I. L. R. 20 Bom. 495.

(3) (1909) I. L. R. 34 Mad. 470.

Judge decreed the suit, and the High Court on appeal confirmed that decree: See *Sri Sithuramswamiar v. Sri Meruswamiar* (1).

Hence this^o appeal.

Sir H. Erle Richards, K.C., and *J. M. Parikh* for the Appellants:

The properties were granted orally, and the Courts below erred in construing the orders to the officials as if they were the original grants. Some of these orders show that the land was given to the founder of the family, the Royal "*guru*." They were given to him from time to time to maintain the dignity of his high office, and consequently the first defendant who is the "*guru*" for the time being, is exclusively entitled to them and the plaintiff has no right to partition them. It is not disputed that the office of the "*guru*" devolves by primogeniture, and that is a material circumstance showing that the properties devolved in the same way in the family. There is a custom of *gaddinashini*, and this also points to the custom of primogeniture in this family: *Thakur Nitpal Singh v. Thakur Jai Singh Pal* (2); *Garudhwaja Parshad Singh v. Saparandhwaja Singh* (3), and Mayne's Hindu law, 8th Ed. para. 469. Reference was also made to *Secretary of State for India in Council v. Kamachee Boy Sahab* (4), for the purposes of showing the action taken by the Government on the escheat of the Tanjore Raj with regard to properties like those in suit. The fact that the plaintiff obtained, received and accepted a fixed monthly allowance, also goes to show that he was excluded from the enjoyment of the alleged joint family properties as co-parcener; this circumstance also negatives the plaintiff's right to partition the properties in question: *Rai Raghunath Bali v. Rai Maharaj Bali* (5).

As to the religious properties, they were given to the founder of the family to manage them for religious and charitable purposes mentioned in the orders to the officials. He was then the head of the *mutt* which he had founded, and it is submitted that they should be allowed to remain under the management of the head of the *mutt* who alone is entitled to manage them. The head of the *mutt* have managed them for more than 160 years. The headship of a *mutt* is not partible, and the properties under his management are therefore not partible: *Trimbak v. Lakshman* (6), and Mayne's Hindu

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(1) (1909) I. L. R. 34 Mad. 470.

(2) (1896) L. R. 23 I. A. 147 (151, 152, 156); I. L. R. 19 All. 1.

(3) (1900) L. R. 27 I. A. 233 (250); I. L. R. 23 All. 37.

(4) (1859) 7 M. I. A. 476.

(5) (1885) L. R. 12 I. A. 112 (115); I. L. R. 11 Calc. 777.

(6) (1895) I. L. R. 20 Bom. 495 (500-501).

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Law, 8th edition, paragraph 439. The Inam Commission title deeds are made out in the name of the manager of a particular charity, and such a manager has always been the head of the *mutt* founded by the first *guru*. It is not disputed that the first appellant is the head of the *mutt*. The plaintiff does not suggest that he has any right to be the head of the *mutt*, indeed, he admits that the first appellant is the only member of the family who is entitled to be the *guru* and the head of the *mutt*, and it is submitted that the first appellant alone is entitled to manage the religious properties. The High Court has relied on *Nubbissen Mitter v Hurrichunder Mitter* (1); *Ramanathan Chetty v. Murugappa Chetty* (2), and *Thandavaroya Pillai v. Shunmugam Pillai* (3); but these cases are distinguishable on facts. In the first case the question as to management arose in connection with the endowment of a family idol. But here the endowment is made by a sovereign ruler and it is therefore a public endowment to which the rules as to management of a private endowment do not apply; *Trimbak v. Lakshman* (4). The endowments in the remaining cases were public, but it was admitted in each of them that on the death of the last sole trustee the office devolved on his heirs. Those cases therefore cannot be authorities for the present case. Moreover, there, the management of a temple was in question, and not the management of charities connected with a *mutt*. Lastly, the scheme providing for equal right of management by all the co-parceners of the family will be detrimental to the interest of the charities themselves.

De Gruyther K. C., and *Kenworthy Brown*, for the Respondents were called upon to argue only the question of the management of the religious properties: The grants were made to Sethubava personally subject to a charitable charge, and the succession to the lands so granted is governed by the ordinary rules of succession according to Hindu Law. In this respect there is no difference between the non-religious and religious properties. They referred to *Lahar Puri v. Puran Nath* (5), and *Giyana Sambandha Pandara Sannadhi v. Kandasani Tambir* (6), and submitted that the institution here was neither a *mutt* nor a religious institution. The installation of the first defendant by other Mahants was simply an honour done to him, and has no legal significance. Even if the institution is a proper *mutt*, there is no evidence to show that it was in existence at the time of the grant, and the properties are not the endowed properties

(1) (1816) 2 Morley's Dig 146.

(2) (1903) I. L. R. 27 Mad. 192.

(3) (1908) I. L. R. 32 Mad. 167.

(4) (1895) I. L. R. 20 Bom. 495 (501).

(5) (1915) L. R. 42 I. A. 115; I. L. R. 37 All. 298; 21 C. L. J. 499.

(6) (1886) I. L. R. 10 Mad. 375 (386-7).

of the so-called *mutt*. It is significant that the Court of Wards which could not perform the duties connected with a *mutt* managed these properties. Moreover, both Courts have held that these properties were not attached to the *mutt*. They are family properties charged with a religious trust, and pass to the heirs of the grantee: Mayne's Hindu law, paragraphs, 438 and 439. The Inam grants are not the source of the title and cannot alter the mode of succession: See rule 3 of the Inam Commission. The "successors" in the Inam title deeds are the heirs of the grantee. Reference was also made to *Ramanathan Chetty v. Murugappa Chetty* (1).

Sir Erle Richards, K. C., in reply, referred to *Sathianama Bharati v. Saravanabagi Ammal* (2), and submitted that the first defendant was in possession and the plaintiff must prove his title to a share of the management.

The judgment of their Lordships was delivered by

Sir Walter Phillimore.—The plaintiff in this suit is the younger brother of the first defendant, and the nature of his claim is twofold.

He alleged, first, that there were certain joint family properties, of which the first defendant had been manager, and of which he now desired his share.

Secondly, that there were certain properties devoted to charitable and religious purposes, and therefore not available for division, in the 'management of which' he was entitled to share, and for which he desired that there should be a scheme of management, settled by the Court.

The second defendant is another younger brother having the same interest as the plaintiff; and the other defendants are widows entitled to allowances during their lives.

The properties, both non-religious and religious, were granted at various times by the then Rajah of Tanjore to the ancestor of the parties, one Setubavaswami. They descended to his son, and that son, having no natural children, to an adopted son, and then to his adopted son, Ramasetuswami, who died, leaving three natural sons, *viz.*, the plaintiff and the first and second defendants.

At the time of the death of Ramasetuswami in 1886 his three sons were minors. The first defendant came of age in 1890, and the plaintiff somewhere about the year 1894. He made a demand of his rights in 1901 and brought his action in 1904.

(1) (1903) I. L. R. 27 Mad. 192. affirmed on appeal in L. R. 33 I. A. 139.

(2) (1893) I. L. R. 18 Mad. 266. (270).

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There is no dispute as to the circumstances in which the original ancestor received the grants of land from the Rajah of Tanjore. He was a holy man, who, somewhere about the year 1739, was brought from a *mutt* or religious institution at Mannargudi to Tanjore, and was constituted by the Mahratta Ruler of Tanjore his *guru*, or spiritual preceptor. His descendants in regular succession became *gurus* to the Rajah as long as the Raj remained, and were installed by the Rajah for the time being with certain ceremonies, one of the most important being the placing of the new *guru* on the *gadi*. There was also a religious ceremony, in which the head of the *mutt* at Mannargudi and certain other heads of *mutts* took part, to which reference will be made later on.

When Ramasetuswami, the father of the parties, died the Raj had escheated; but after the usual religious ceremony had taken place, the man claiming to be the adopted son of the last Rajah installed the first defendant with the accustomed ceremony; and there is no doubt that the first defendant is the *guru* of the man who installed him.

The contention on behalf of the first defendant is that the office of *guru* is hereditary by way of primogeniture, and that the non-religious lands were given to the *guru* for the time being to maintain the dignity of his office, and are therefore impartible.

The contention for the plaintiff is that these lands were granted to the original *guru*, no doubt as a reward for his services, but to him personally and his heirs, and not as an appanage or endowment of the office of *guru*.

Shortly after the escheat of the Raj in 1855, enquiries were directed by the Government with a view of ascertaining whether the properties enjoyed by Ramesetuswami were service lands, that is, land enjoyed or endowments of offices held by servants or ministers of the Rajah, which would escheat upon the termination of the Raj, or whether they had been bestowed as personal grants; and a report was made which was acted upon by the Government to the effect that these non-religious properties were not service lands but personal grants, and consequently had not escheated. Thereupon new *inam* grants in confirmation of the original grants were made by the Government to the father of the parties.

The original grants of the non-religious lands show no indication that they were made by way of endowment of an office. The utmost that can be said on behalf of that contention is that the grantee is sometimes described as a Royal Priest. But this is mere description.

The confirmation grants of the non-religious lands describe them as the personal *inams* of the grantee to be held by him as his absolute property to hold or dispose of as he thinks proper, subject to the quit rent. In some of the grants the *inam* is said to be tax free and hereditary, and that on failure of lineal heirs it will lapse to the State.

There is nothing in these documents, or in any of the other circumstances of the case, to take the descent of the non-religious lands out of the ordinary rule of inheritance. This is what has been decided in favour of the plaintiff by the Subordinate Judge, and in the High Court of Judicature of Madras upon appeal; and their Lordships see no reason to differ from this conclusion. They arrive without hesitation at the result that the appeal of the first defendant against this part of the decision in the Courts of India fails.

Both Courts have also decided in favour of the plaintiff on the other claim, and have directed that there should be a scheme for the management of the religious and charitable properties, to be settled in due course. This part of the case has given their Lordships more difficulty.

No scheme has, so far, been settled, but there is no doubt as to the lines on which the scheme would proceed. It would, as asked by the plaintiff, provide for equal rights of management by the plaintiff and the first and second defendants and their heirs, either by giving the management to each in rotation, or possibly by dividing the charities and assigning the management of some to one and of the others to the others.

This will be the nearest approach that can be made to the ordinary partition which is granted at the request of any one of the co-parceners of Hindu family lands.

The objects for which these properties were given are described in the deeds as being for the purpose of perpetually conducting a food *chattrum* near the tomb of the holy man Meruswami, and in one case for the purpose of making an *agrahar* by building houses round about the holy place.

With regard to what are called private charities, such as endowments for the support of the family idol, the law, as laid down by various decisions in India, and apparently accepted in one case by the Privy Council *Ramanathan Chetty v. Murugappa Chetty* (1), is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original

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(1) (1903) I. L. R. 27 Mad. 192; L. R. 33 I. A. 139.

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grantee, and, if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition, or in turn by the several heirs after partition.

But their Lordships' attention has not been drawn to any case in which these decisions as to management have been applied to lands which constitute the endowment of such a charity as those in question in this suit.

The case most nearly in point is *Thandavaroya Pillai v. Shunmugam Pillai* (1), but it does not decide this question, and does not seem to have come up before the Privy Council.

It is unnecessary, however, to decide whether there is a general rule for the devolution of the management of charities of this class because, in their Lordships' view, there is sufficient indication in the documents and in the surrounding circumstances of this case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowments.

The grants of the religious or charitable lands made by the Mahratta Rajah to Setubavaswami, which take the form of orders to his officers, describe them as being for the purpose of *inam* and for the purpose of perpetually conducting or establishing the defined charity; and they proceed to state that for this purpose they had been given to the Royal Priest, Setubavaswami.

Having regard to the donee's position and the way in which these grants are set forth, it would be difficult if there was nothing else to guide the Court to determine whether these grants were made to the person or to the office. But the deeds of confirmation of the religious lands made by Government in 1865 are of assistance. They are in a different form from that used in the confirmation grants of the non-religious lands. Each is described as a title-deed granted to the manager for the time being of the charity, which is then described. By the deed the title of the manager is acknowledged the *inam* is confirmed to him and his successors. There is no personal name, and it is only from external evidence that it can be determined that the grant was to Ramasetuswami, the father of the parties.

Taking, as their Lordships do, the view that it was not intended by these confirmation deeds to vary the previous rules as to the descent of the religious lands, any more than it was intended to vary the previous rules as to the descent of the non-religious lands, these

(1) (1908) I. L. R. 32 Mad. 167.

confirmation grants afford evidence as to the nature of the tenure, as it was commonly understood at the time. These lands, then, had been held, and were to be held in future, by the particular office-bearer from time to time. That office-bearer is, in their Lordships' opinion, to be found in the head of the *mutt*, or institution founded when the original *guru* was induced by the Rajah to migrate from Mannargudi. He would be one person, not several, and the first defendant is the present head.

It is in evidence that the installation ceremonies which are believed to have occurred upon the succession of each new *guru* were of a double character. The induction, as it may be called, by the Rajah to the office of Royal Guru with a seat upon the *gadi* was preceded by a religious ceremony in the nature of an ordination or institution in which the *Mohunt*, or head of the parent *mutt*, placed the first defendant in the seat of headship, other heads of *mutts* taking part in this ceremony, and certain religious rites following.

It is in evidence that the defendant, as the head of the *mutt* thus constituted, performs in person, or by deputy, certain religious rites, has given initiation to some people, no doubt not many, and has on some, not very frequent, occasions given religious instruction. He is thus pointed out as the natural head and administrator of religious charity; and the office of head of the *mutt* and administrator of the charity have been associated from the first.

The headship of a *mutt* is not a matter of partition. Indeed, the plaintiff admits that he has no claim to share in it. This being so, it appears to their Lordships that the intention of the founder must be deemed to have been that his religious charities should be administered by the man who was head of the *mutt*, to which office the eldest son of the previous holder would naturally succeed, the office being indivisible among the members of the family, and the principles to be applied being those laid down in the case of *Jafar v. Aji* (1), and further approved in *Trimbak v. Lakshman* (2). This being so, there was no jurisdiction in the Indian Court to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.

This part of the appeal therefore succeeds.

Their Lordships think that the plaintiff should have his costs in the Court of first instance, as he there recovered a very substantial part of his claim, *viz.*, his right to share in the inheritance, and to have partition, if he desired, of the non-religious lands; but they

(1) (1864) 2 Mad. H. C. R. 19.

(2) (1895) I. L. R. 20. Bom. 495.

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think that there should be no costs of the appeals to the High Court and to His Majesty in Council.

Their Lordships will therefore humbly recommend His Majesty that the decree of the High Court of Judicature of Madras be varied, in so far as it confirmed that part of the decree of the lower Court, paragraph 8, which ordered that a scheme be settled for the due management of the religious and charitable properties, and so far as it ordered the first defendant to pay the costs on appeal of the plaintiff and second defendant; and that the decree of the lower Court be varied by striking out paragraph 8, and that there be no costs of the appeal to the High Court or to his Majesty in Council.

Chapman, Walker and Shepherd :—Solicitors for the Appellants.

Douglas Grant :—Solicitors for the Respondents.

J. M. P.

Appeal allowed in part.

PRESENT :—*Lord Buckmaster, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.*

H. H. MIR ABDUL HUSSEIN KHAN

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MUSSAMMAT BIBI SONA DERO AND ANOTHER.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF SIND.]

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October, 30.

Custom—Family custom—Burden of proof—Alleged presumption in favour of custom—Bombay Regulation IV of 1827, Sec. 26—Punjab Laws Act (IV of 1872), Sec. 5—Evidence necessary to support valid custom—Instances may be useful even though all the requisite conditions of a custom are not proved in each instance—Importance of revenue records—Mahomedan family—Inheritance—Exclusion of daughters in favour of their brothers.

Where either party to a suit relies upon a "custom" as a rule of decision, it is incumbent upon him to allege and prove the custom on which he relies.

No presumption in favour of custom as against the general or personal law is created by clauses such as section 26 of the Bombay Regulation IV of 1827 or section 5 of the Punjab Laws Act : it is only when the custom is established that it is to be the rule of decision : *Daya Ram v. Sohel Singh* (1) approved.

(1) (1906) 41 P. R. 390 (410).

Custom binding inheritance in a particular family, although not known to English law and foreign to its spirit, has long been recognised in India; and if the custom were in fact well established in one particular family, whether it were enjoyed or no by another family would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed.

Soopendronath Roy v. Mussamut Heeramonee Burmoniah (1) followed.

Special usages modifying the ordinary law of succession must be ancient and invariable and established to be so by clear and unambiguous evidence: *Ramalakshmi Ammal v. Sivanatha Perimal Sethurayar* (2) followed.

Where a large number of conditions have to be fulfilled to test a custom, and a number of instances are adduced in proof of that custom, it is necessary that one or more examples of each condition should be established, but it is not necessary that all the conditions should be proved in each instance. The latter requirement would greatly weaken the evidence by tradition to which in certain cases great weight is due.

The best evidence as to custom of inheritance is generally found in connection with the division of land, if any, and the revenue records are therefore of considerable value and omission to produce them is serious. Where the question was whether there was a custom in a Mahomedan family excluding daughters from inheritance, and instances given in support of the custom showed that the excluded daughters were unmarried and living with their brothers, *held*, that such instances cannot be confidently relied upon as establishing the custom, for the position and relationship of the different members of the family must always be considered in determining whether claims were not met because the rights to which they related did not exist or whether they were put on one side because in the circumstances, there was no need that they should be asserted: *Mirabivi v. Vellayanna* (3) approved.

Appeal from a decree of the Court of the Judicial Commissioner of Sind (January 9, 1912) reversing a decree of the Additional Judicial Commissioner (District Court Jurisdiction), dated the 31st May, 1910.

The facts of the case are sufficiently stated in the judgment of their Lordships. The suit related to the property of a Mahomedan intestate, and the only questions for determination were, (1) whether the deceased was a Shia or Sunni, and (2) whether there was a custom in his family excluding daughters of the deceased in favour of their brothers, and sisters in favour of male paternal collaterals. If such a custom were established the plaintiff-appellant who was the son of the brother of the deceased by half-blood would get the

(1) (1868) 12 M. I. A. 81 (91).

(2) (1872) 14 M. I. A. 570 (585).

(3) (1885) I. L. R. 8 Mad. 464 (465).

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whole irrespective of the fact whether the deceased was a Shia or Sunni; while if the deceased were held to be a Sunni, the plaintiff would be entitled to a half and the first defendant-respondent, the sister of the deceased, would get the other half; and if the deceased were a member of the Shia sect, the sister would inherit the whole estate. Both Courts in India found that the deceased was a Shia, but the Court of first instance held that the custom set up was proved and therefore decreed the suit; while the appellate Court held that the custom was not proved and dismissed the suit. Hence this appeal.

P. O. Lawrence K. C., and *Colonel Arthur Grey* for the Appellant: The question is whether there is a custom excluding females from inheritance. The allegation in the plaint was that "according to the custom regulating the inheritance by females in the family of the parties and amongst the respectable Baloochis and Sardars, which is ancient and which is invariable, and has been acted upon from time immemorial, and which has obtained among Sunnis or Shias alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations." The words "and amongst the respectable Baloochis and Sardars" were introduced owing to the decision in *Pranjivan Dayaram v. Bai Rewe* (1). They gave trouble in the appellate Court which held that these words made the custom pleaded too vague, and declined to allow any amendment of the pleadings. But this family is not included among the Baloochis and Sardars and the custom is sufficiently exact. The phrase about respectable Baloochis and Sardars is surplusage. The real issue was whether the custom prevailed in the family. The fact that an indefinite class was added is irrelevant.

The appellant has proved 58 instances in which the custom was followed. But the appellate Court has gone into the question of the origin of the custom, and held that the origin suggested by the appellant that a woman was excluded on the ground of her inability to carry a sword was the real origin, the custom was founded "not on legal reason but on violence and oppression and is therefore unreasonable": Not a single woman has been called in support of the custom and this coupled with the fact that the women affected are *purdanashin* women, raised a strong presumption that the practice of it exists is founded as said in *Tyson v. Smith* (2) "in wrong and usurpation and not on the voluntary consent of the people to whom it relates." But it is not necessary for the appellant to prove the origin of the custom. The defendants made no attempt to prove

(1) (1881) I. L. R. 5 Bom. 482. (2) (1838) 48 R. R. 539; 9 Ad. & Ell. 406.

that the custom or the numerous instances of it proved were accounted for by violence or oppression. They have called no woman not even the first defendant as a witness. "Violence and oppression" must be proved, not merely suggested. The first defendant's own son has proved two instances where she suffered by the custom. Neither side has called women, and no comment was made on their being left out either by the parties themselves or by the trial Judge.

In *Tyson v. Smith* (1), the custom was upheld. But that case dealt with the English notion of custom which is quite different from that in India. There is no plea and no issue on the point whether the custom is reasonable. It is submitted that the custom here is reasonable in the sense that it approximates to numberless other cases where women have been excluded.

Once it is held that the parties are governed by customary law, the presumption is in favour of custom as against any personal law, and it is only where custom fails that resort can be had to the personal law: *Daya Ram v. Sohail Singh* (2), and Sir W. Rattigan's Digest of Customary Law, page 1. The case cited is under section 5 of the Punjab Laws Act, but the law applicable here (section 26 of Bombay Regulation IV of 1827, which has by notification been extended to Sind) is precisely the same.

It is submitted that the finding of the trial Judge is right.

Reference was also made to *Sundaralingasawmi Kamaya Naik v. Ramasawmi Kamaya Naik*, (3) *Mohesh Chunder Dhal v. Satrugan Dhal*, (4); *Ramlakshmi Ammal v. Sivanatha Perumal Sethurayar*, (5) and Mayne's *Hindu Law*, 8th edition paragraph 50.

De Gruyther, K.C., and *Sir W. Garth*, for the Respondents: The general law applicable to all Mahomedans in India is the Mahomedan Law: 21 Geo. 3. C. 70, S. 17. To displace that personal law in favour of a custom strong evidence is required to establish the custom. It is quite common to find instances where Mahomedan ladies do not claim their right of inheritance, but this is far from proving that they have not got any such rights: *Mirabivi v. Vellayanna* (6).

The history of this particular family is to be found in the Imperial Gazetteer of Sind, Vol. 22, pp. 397 et seq. to which the Court may refer under section 57 of the Indian Evidence Act. As

(1) (1838) 9 Ad. & Ell. 406.

(2) (1906) 41 P. R. 390.

(3) (1899) L. R. 26 I. A. 55; I. L. R. 22 Mad. 515.

(4) (1902) L. R. 29 I. A. 62; I. L. R. 29 Calc. 343.

(5) (1871) 14 M. I. A. 570.

(6) (1885) I. L. R. 8 Mad. 464.

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to authorities to which reference can be made in such matters, see also *Read v. Bishop of Lincoln* (1). Reference was also made to section 87 of the Indian Evidence Act.

Revenue records are of great importance in the case. They show all the people who have held the various estates. There is nothing in the register produced to show that the appellant's witnesses as members of the family ever owned what they claim here. The omission to produce revenue records shows that there was no land owned by the appellant's family.

It is submitted that the custom is not established and that the judgment of the appellate Court is right.

There is no force in the contention that the rule as to custom laid down by this Board in *Ramalakshmi Ammal v. Sivanatha Perumal Sethurayar*, (2) does not apply to the Punjab and Sind. It still remains the law that whoever sets up a custom in any part of India must prove it. This was clearly recognised in the case of the Memons, who are Mahomedans: *Mahommed Siddick v. Haji Ahmed* (3).

Grey replied.

The judgment of their Lordships was delivered by

October, 30.

Lord Buckmaster.—On the 30th January, 1907, Mir Hussein Ali Khan of Talpur died intestate, leaving neither widow nor child. His nearest surviving relations were the plaintiff, Abdul Hussein, the son of his brother by the half-blood, one sister, the first defendant upon the record, and his sister's son, who is the second defendant. His estate, consisting exclusively of personal property, and largely of what we should call personal effects, is of great value, and doubtless also, from the character of many of the articles, of great personal interest to his relations. It is a dispute about the inheritance of this property that has given rise to the present appeal. The deceased was a member of the family of Talpur Mirs of Sind, who were a branch of the large Baluchi tribe. He was a Mahomedan, and, if Mahomedan law governed the question, the rights of the parties would vary accordingly whether the deceased was a member of the Shia or of the Sunni sect. If the former, the sister would inherit the whole estate; if the latter, the plaintiff would be entitled to a half. The plaintiff alleges, however, that the rights of inheritance are not to be determined according to Mahomedan law, but that they are regulated by a custom well-known and distinctly ascertained, by which, notwithstanding the provisions of the Koran,

(1) (1892) A. C. 644.

(2) (1872) 14 M. I. A. 570 (585).

(3) (1885) L. L. R. 10 Bom. 1 (9).

women are excluded from any share in the inheritance of a paternal relation. He further alleges that, if this contention does not prevail, the deceased was a Sunni and not a Shia, and that he is therefore entitled to the more limited rights to which reference has been made. Their Lordships think it is convenient to dispose of the latter contention first.

Although the holding of religious opinion is a matter of personal faith, and ordinarily it may not be easy to determine what the nature of that faith may be, yet in a case like the present, where the question lies between two sects so sharply divided in ritual and observances, performance of prayers, and public declarations of faith as the Sunni and the Shia, it is readily capable of being determined by definite evidence of action, conduct, and observance. For reasons which their Lordships consider as conclusive, both the Judicial Commissioner, before whom the case was first tried, sitting as District Judge, and the Court of the Judicial Commissioner of Sind, before whom the appeal was heard, have decided that the deceased was of the Shia persuasion, and with this finding their Lordships see no reason to interfere.

There remains therefore for consideration only the question of custom, and upon this the Court of first instance and the Court of appeal have differed, the District Court holding that the custom was established, and the Court of the Judicial Commissioner of Sind deciding that it was not. It is from this latter decision that the present appeal proceeds.

Before proceeding to investigate the facts and circumstances that have influenced the two judgments already mentioned, it is desirable to make plain what is the position of a person like the plaintiff, who asserts that custom and not Mahomedan law gives him the rights he claims. The appellant alleges that, by section 26 of the Bombay Regulation of 1827, which has by notice been extended to the District of Sind, a presumption ought to be made in favour of the existence of a usage or custom where it is known that that usage or custom is prevalent. He bases this argument upon the words of the Regulation, which are as follows: "The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone."

Their Lordships cannot accept this view. In a case of *Daya*

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Ram v. Soheli Singh and others, (1) which related to proof of a Hindu custom, the Chief Court of the Punjab had to consider a similar question on the terms of section 5 of the Punjab Laws Act, the words of which are more strictly in favour of the appellant's contention than those of the Regulation that governs this dispute. This contention was dealt with by Mr. Justice Robertson at p. 410 of the report in words which their Lordships think so aptly and expressly declare the true relation of the necessity of proof as between customary and established law that they may with advantage be reproduced. The learned Judge said:—

"In all cases it appears to me under this Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further, to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The legislature did not show itself enamoured of custom rather than law nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be a rule of decision, but only 'any custom applicable to the parties concerned which is not . . .'; and it therefore appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so clause (b) of section 5 of the Punjab Laws Act applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

The principle that underlies this statement is, in their Lordships' opinion, correct, and is applicable to the construction of the Regulation that governs the present case. It is therefore incumbent upon the plaintiff to allege and prove the custom on which he relies, and it becomes important to consider the nature and extent of the proof required. Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognised in India [see *Sooendranath Roy v. Mussamut Heeramoonee Burmoneah* (2)] although such a custom is unknown to the law of this country and is foreign to its spirit. Customs affecting descent in certain areas or customs affecting rights of inhabitants of a particular

(1) (1906) 41 P. R. 390.

(2) (1868) 12 M. I. A. 81 (91).

district are perhaps the nearest analogies in this country. But in England, if a custom were alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by people outside the district, the custom would fail. This principle, however, it seems to their Lordships, ought not to be applied in considering such a custom as the one claimed here, since, if the custom were in fact well established in one particular family, whether it were enjoyed or no by another family would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed.

Nor are their Lordships prepared to accept without qualification the statement of Mr. Justice Crouch that it is necessary to reject as useless for proving the custom "all those instances where we have no evidence that the deceased left any estate at all, or where there is no evidence to show its nature or value, or the amount of liabilities against it, e.g., whether or not it consisted merely of a Jagir, or *Mafi* land, or of heirlooms, or of land heavily mortgaged, or of the family demesne; where there is no proof and no admission that the lady said to have been excluded had a legal claim to a share under the ordinary law; where, in case of a married lady, we have no evidence showing the actual amount of dowry received; where, in case of unmarried ladies, there is no proof that they knew of the custom and stood aside in obedience to it. And in all those cases where a witness states that he has himself excluded his own sisters, or nieces, our judgment as to the value of such statement as evidence of the custom having been enforced must be held in suspense until there is also evidence before us that the ladies had independent advice, and, with full and intelligent knowledge of the custom, voluntarily acquiesced in their exclusions." An example of each of the conditions there laid down ought certainly to be established by some witness, but it is not, in their Lordships' opinion, necessary that all should be proved in every case, as this might greatly weaken the evidence by tradition to which in a custom of the character under consideration great weight is due.

But, as pointed out by this Board in *Ramalakshmi Ammal v. Sivanatha Perumal Sethurayar* (1): "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should

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be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

It is therefore necessary to define what is the custom, and then examine the evidence to see if it satisfies the conditions so laid down. It is urged against the appellant that he alleged the custom on which his case depends in three different forms: first, in the plaint filed on the 12th July, 1907, in which he asserted his rights as arising from current and immemorial custom of the dynasty of the parties; secondly, in an affidavit sworn by him on the 10th July, 1907, where he said that the custom was "that a woman after her marriage loses all interest and right of inheritance in the property left by her relations (on the father's side)"; and finally in the plaint in the present proceedings, where the custom is asserted in these terms: "But according to the custom regulating the inheritance by females in the family of the parties and amongst the respectable Balochis and Sardars, which is ancient and which is invariable, and has been acted upon from time immemorial, and which has obtained amongst Sunnis or Shias alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations."

There certainly is a marked difference between these different customs, but their Lordships are not prepared to give this fact such weight as to crush the appellant's case, and they will assume that the custom upon which he relies is a custom by which, in the event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals, and the question is, was such a custom proved?

A very large number of witnesses were called in its support, and a number of instances, amounting to sixty-one in all, were given as evidence of its operation. This evidence has been the subject of the most painstaking and careful analysis by both the Courts, and has again been carefully considered by their Lordships with the assistance of the criticisms made, both in the District Court and in the Court of appeal. Upon the whole their Lordships think that this evidence fails to satisfy the necessary standard of proof and that upon this point the judgment of the High Court must be accepted. Their Lordships do not propose to examine again in detail each one of the instances mentioned, for there are one or two general observations which are, in their opinion, sufficient.

The custom alleged, in its form most limited and best suited to the plaintiff's case, is a custom confined to the Talpur Mirs, the descendants of one Kaku Khan. These descendants are now represented by eight different families, viz.: Sorabanis, Rustomanis, Bijranis, Shahdanis, Mahomedanis, Shahwanis, Jamanis, and Manikanis of which the deceased belonged to the Shahdanis. Relevant and material instances are to be extracted from the descent of these families. The attempt to extend the custom to the "respectable Balochis and Sardars" broke down, and it would in their Lordships' opinion, under any circumstance, have been unsafe to assume a custom applicable to a group of people so vaguely defined as those covered by the definition of "respectable Balochis and Sardars." Dealing, therefore, with the Talpur Mirs alone, their Lordships think the evidence is subject to the following comments:—

In the first place, many of the instances relate to descendants of a ruling family and depend upon the eldest son inheriting to the exclusion of his brothers and sisters. Although it is true that the sisters are excluded, yet it is plain that we have not in these cases reached the custom on which the plaintiff relies, because in a ruling family an over-riding custom has excluded all males as well as females in favour of the eldest male. Nine further cases relate to instances where the excluded daughters were unmarried and living with their brothers. These instances cannot be confidently relied upon. The position and relationship of the different members of the family must always be considered in determining whether claims are not met because the rights to which they relate do not exist or whether they are put on one side because, in the circumstances, there is no need that they should be asserted. This is pointed out in the case of *Mirabini and another v. Vellayanna and others* (1) by Chief Justice Turner and Mr. Justice Hutchins. It is there stated at p. 465:—

"It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored, or they have been allotted maintenance, though the cases mentioned by the Judge of a partition in the father's lifetime are not inconsistent with Mahomedan law. There are also cases in which married daughters have been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Mahomedan law. Indeed, in many parts of the country it is unusual for Mahomedan ladies to insist on their unquestioned rights. They will often prefer being

(1) (1885) I., L. R. 8, Mad. 464.

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maintained by their brothers to taking a separate share for themselves, and when they are married the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Mahomedan females are so much under the influence of their male relations that the mere partition of the property among the males without reference to them cannot count for much."

And with this statement their Lordships are in entire agreement.

In certain other instances, and notably in 24, 35, and 45, there is no substantial evidence of property to be divided, and in the most recent cases of all, 52-50, there is only one witness who speaks in their support, although it is plain that there must have been others who could have spoken upon the matter. It ought not, of course, to be assumed that a custom fails because certain of the instances brought forward in its support may be referable to other causes than the custom relied upon; nor again, because in certain respects some of the witnesses may be found untrustworthy.

But there is one outstanding circumstance in the present case which their Lordships think demands attention. Mir Rustom Khan is the admitted head of the Rustomanis. He is a man of position and authority, and he says in plain terms that "there is no such custom amongst our families by which daughters and sisters are excluded from inheritance. They get their share of inheritance according to Mahomedan law."

He is supported by other witnesses, of whom the learned trial Judge says that they are all witnesses of high position, and that there seems no special reason why they should combine to give false evidence on behalf of the defendants, although he adds that Mir Rustom Khan was not on good terms with the plaintiff, and inclined to exaggerate his evidence. But the learned Judge declines to accept the view that these important witnesses are committing perjury, and the statement which he thinks shows a tendency to bias in favour of the defence is a statement which may well have been misunderstood. Mir Rustom Khan was speaking of the religion of the deceased, and stated that whenever a Sunni entered his house he had it washed three times. As the servants were Sunnis the learned Judge thinks that this is a clear improbability. It appears to their Lordships quite possible that Mir Rustom Khan was only referring to people of a similar social standing to the deceased, who, it is not unreasonable to assume, would not pay the same attention to the religion of his servants that he might to the religion of his friends. But however this may be, Rustom Khan

can have been under no misapprehension upon the question of this custom. If he did not know of it it may be safe to say that it did not exist. If he did know of it he could not have denied the knowledge without deliberate untruth, which there is no reason to impute to his evidence.

There is, however, one instance in connection with his testimony which does need some further consideration. Mir Validad Khan, who was the paternal uncle of Rustom Khan, died leaving three sons and six daughters. Mir Rustom Khan was asked to determine how the estate should be divided among the three sons, and he made an award, effecting this division. It is suggested that if no such custom as that alleged existed he must have known that he was making an improper division of the property. Their Lordships do not think this is the only and necessary inference. He was never asked to determine the rights as between the brothers and the sisters, but merely how to divide the property among the brothers themselves, and it may well be that he assumed that arrangements had been made with the sisters which rendered it unnecessary for him to consider anything more than the actual point that he was called upon to determine. He also speaks to a matter, to which constant reference is made by the witnesses, and that is that the question of inheritance is decided in each family, either by a family council or by the head of the family. This is an extremely probable explanation of many of the instances in the present case, and if it be accepted it destroys the custom, because the division made according to the wishes of the members of a family council is certainly not the custom on which the plaintiff relies.

o In every case of this kind the burden of proof lies heavily upon the plaintiff, and though his evidence may consist of a number of striking instances in support of his case, it receives a severe blow when prominent members of the families concerned deny that the custom exists.

There is also another piece of evidence which is of considerable value: this is to be found in the revenue records which relate to the descent of the property of Mir Ghulam Ali Khan, who died leaving three widows, one sister, two daughters, and a brother; one of these records, dated October, 1903, shows a clear division according to the Mahomedan Law, and not according to any such custom as is alleged. There are no other revenue records produced, and it is said that the reason of their non-production is that they do not assist the defendants' case. But their Lordships think the omission is serious. The best evidence associated with any such custom as

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that alleged would be found in connection with the division of land, and these records would at least have established the fact that land was left, its extent and character, and would, were it the fact, make clear the point which the evidence leaves uncertain, that, in the division of this property, the women were excluded.

The argument put forward by the defendant that, in many of the cited instances, the women said to have been excluded have been provided with dowries either in the lifetime of the owner of the estate, on the division of which they received no benefit, or after his death by a male relation, and that this was equivalent to and must be taken as a recognition of their right to share, is one to which their Lordships are unable to accede. It is quite possible that the husband of a wife who had been suitably dowered would not desire to claim rights of inheritance against those by whose generosity or at whose expense the dower had been provided, but this would not involve the conclusion that the right to share existed and had been satisfied by the dower.

Again, such an argument, though it might affect inheritance as between father and daughter, would not cover the present case, for, if a daughter had been dowered by her father, and this were treated as equivalent to an advancement of her share in his estate, this would not affect a claim like the present put forward by a woman to a share in her brother's estate by whom she had never been dowered at all.

The ground upon which their Lordships base their judgment does not include any such considerations; it is their opinion that, although there is much reason in history for the custom alleged, and some evidence by which it receives support, yet on the whole the evidence has fallen short of the standard to which it must attain in order to succeed in altering the devolution of property according to Mahomedan law to a devolution determined by a family custom, and they will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

E. Dalgado: Solicitor for the Appellant.

Wontner and Sons: Solicitors for the Respondents.

J. M. P.

Appeal dismissed.

PRESENT: *Lord Parker of Waddington, Lord Wrenbury, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.*

*KRISHNASAMI PANIKONDAR

v.

S. R. M. A. R. RAMASAMI CHETTIAR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT MADRAS].

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November 8.

Limitation—Indian Limitation Act (XV of 1877), Secs. 4, 5—Ex parte order admitting appeal out of time—Such an order set aside at hearing—Jurisdiction—Practice—Stage at which the question of Limitation should be finally determined after due notice to all parties.

The admission of an appeal on an *ex parte* application of the appellant, under section 5 of the Indian Limitation Act, after the expiry of the period of limitation prescribed therefor under section 4, deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour, and consequently such an order is open to reconsideration at the respondent's instance.

The question of limitation should not however be left open till the hearing of the appeal, though this may have hitherto been the practice in India. The Courts in that country should adopt a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of an appeal.

The order of a Divisional Bench of the Madras High Court was upheld that at the time of hearing an appeal it had jurisdiction to set aside an *ex parte* order made by a single Judge of that Court admitting an appeal out of time.

Appeal from an order of the Madras High Court (November 4, 1908) dismissing an appeal presented by the appellant against a decree of the Subordinate Judge of Tanjore (February 8, 1905).

The suit in which the appeal arose was brought by the respondent to recover possession of a zamindari. The Subordinate Judge passed a decree in favour of the respondent, and the appellant, who was the first defendant and had presented his appeal after the expiry of the period of limitation of 90 days, obtained an *ex parte* order admitting his appeal from a single Judge of the High Court (Sankaran Nair J.), who excused the delay. At the hearing of the appeal the learned Judges constituting a Division Bench rejected the appellant's story and held that the appeal was barred by limitation.

Sir Erle Richards, K.C., and Kenworthy Brown for the Appellant: The order admitting the appeal was made on July 31, 1905. Although notice of admission was given to the respondent, he only applied to set it aside on September 28, 1908. This application was barred by limitation and should have been dismissed.

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There is no inherent power in a Court to reverse its own decision; it depends on the Code of Civil Procedure: practice alone is not enough.

The admission order was made under rule (b) of the Madras High Court Rules, Appellate Side, which came into force in January, 1905. Under these rules a single Judge has power to admit an appeal presented after time. The respondent's only remedy against the admission was by applying for review under section 623 of the Code of Civil Procedure, 1882, and to do this he was bound by time. The practice in Madras since the decision in *Venkatramyudu v. Nagadu* (1), has been against this contention but such practice cannot override the provisions of the Code of Civil Procedure. The application for review should have been made to the same tribunal. The two Judges who heard the appeal had no power to set aside Mr. Justice Sankaran Nair's decision: it was not an order, for it was a determination of the point.

It was held by the Calcutta High Court in the case of *Bharat Chunder Roy v. Issur Chunder Sircar* (2), that when an appeal had been admitted and notice given to the respondent the appellate Court had no jurisdiction at the hearing to reject the appeal as out of time. A different view was taken by the Allahabad High Court in *Dubey Sahai v. Ganeshi Lal* (3), but *Jhotee Sahoo v. Omesh Chunder Sircar* (4), supports the contention, while *Bhismadeo v. Sita Nath* (5) is suggested as against the contention.

Even though Mr. Justice Sankaran Nair may have been wrong in not adding to his order the words "subject to objection at the hearing," still he has made an order which he had jurisdiction to make, and his order stands final.

(On the counsel proceeding to the merits as to delay *De Gruyther, K. C.*, for the respondent, referred to *Corporation of St. Johns v. Central Vermont Ry Co.* (5), and said that the argument should be confined to the grounds set forth in the application for special leave to appeal, and that as the question of merit was not made a ground in that application, it was not now open to the appellant, but that he would not press his objection.) Counsel for the appellant then argued on the merits.

De Gruyther K. C., and *O'Gorman* for the first Respondent were not heard.

The judgment of their Lordships was delivered by

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| (1) (1886) I. L. R. 9 Mad. 450. | (2) (1867) 8 W. R. 141. |
| (3) (1875) I. L. R. 1 All. 34. | (4) (1879) I. L. R. 5 Calc. 1. |
| (5) (1912) 17 C. W. N. 42; I. L. R. 40 Calc. 259. | |
| (6) (1889) L. R. 14 A. C. 590. | |

Sir Lawrence Jenkins:—On the 4th November, 1908, the High Court of Madras dismissed an appeal from an original decree on the ground that it was barred by limitation. From this order of dismissal the present appeal has been preferred, and in its support it has been contended, *first*, that the order was without jurisdiction, and, *secondly*, that it was erroneous on the merits.

The original decree was passed on the 8th February, 1905, in the Court of the Additional Subordinate Judge at Tanjore in the plaintiff's favour.

Against it the first defendant, Krishnasami Panikondar, preferred an appeal to the Madras High Court. The last day for its presentation was the 10th July, when the Court re-opened after vacation; but it was not presented until the 12th July, 1905.

It was then returned to the appellant as out of time. It thus became necessary for the appellant to satisfy the Court that he had sufficient cause for not presenting his appeal within the prescribed period.

He accordingly again presented his appeal on the 26th July, supported this time by affidavits purporting to explain the delay. The application for admission came before Sankaran Nair, J., sitting as a single Judge, and on the 31st July he made an order in these terms: "Delay excused in the circumstances and appeal admitted."

When notice of this appeal was served on the respondents does not appear, but in the following November affidavits were filed controverting the material allegations in those on which delay had been excused. Further affidavits were subsequently filed on both sides.

The appeal thus admitted came on for hearing before a Division Bench of the Court on the 7th October, 1908, and at the outset it was objected that the appeal was out of time, and so not competent. The Court, after an examination of the several affidavits, accepted this view and dismissed the appeal, as provided by section 4 of the Indian Limitation Act. A subsequent application for review failed.

It has been argued that the admission of the appeal by Sankaran Nair, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning

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its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India.

But there remains the contention that, at any rate, the Court exceeded its jurisdiction in permitting the question of limitation to be reopened at so late a stage as the hearing of the appeal. This objection, however, has all the appearance of an afterthought. It was not urged at the hearing, though the appellant was represented by so experienced an advocate as Sir Basbyam Aiyangar; nor was it even mentioned in the original review petition. It was no doubt advanced at a later stage as an additional ground for review, but it met with no success, for the High Court held that the procedure adopted in the case was in accordance with the usual practice of the Court. The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances their Lordships hold that the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties), of any question of limitation affecting the competence of the appeal.

On the merits little need be said. It is the duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. It was with the claim of such a litigant that the Division Bench had to deal, and after a careful and critical examination and appreciation of the evidence, the learned Judges distrusted his explanation and held that sufficient cause had not been shown. The Court therefore declined to exercise in his favour the power to excuse delay. It has not been shown that in this the Court fell into any error, and their

Lordships consequently decline to interfere with its decision. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Douglas Grant :—Solicitor for the Appellant.

Chapman Walker & Shepherd :—Solicitors for the 1st Respondent.

J. M. P.

Appeal dismissed.

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APPELLATE CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Mr. Justice
Teunon and Mr. Justice Walmsley.*

SARAJ RANJAN CHAUDHURI

v.

PREM CHAND CHAUDHURI AND OTHERS.*

*Limitation—Limitation Act (XV of 1877), Sch. II. Art. 109—Sale under
Putni Regulation (VIII of 1819)—Purchaser given possession—Sale set
aside—Decree, reversal of.*

A putni was sold in October, 1901, under Putni Regulation for arrears of rent. The defendant purchaser was put into possession. The plaintiff, the owner of the putni, instituted a suit for setting aside the sale on the 17th May, 1902. In that suit they made no claim for mesne-profits which had accrued either before the suit or which accrued during the pendency of the suit. On the 18th August, 1902, the suit was decreed in the first Court, with the result that the sale was set aside. On appeal, the first appellate Court reversed the decree of the first Court on the 13th February, 1903. Then there was an appeal to the High Court and on the 11th of May, 1905, the High Court remanded the case for further consideration and decision, to the first appellate Court. On the 11th September, 1905, the first appellate Court affirmed the decision of the first Court with the result that the sale was set aside. A second appeal to the High Court was dismissed on the 30th May, 1907. The plaintiff then instituted the present suit on the 16th September, 1907, for mesne-profits from March 1903 to the date of suit :

* Letters Patent Appeal No. 4 of 1916, against the decision of Mr. Justice Doss, dated the 30th June, 1909, in Appeal from Original Decree No. 84 of 1908, against the decree of Babu Jogendra Nath Mitter, Subordinate Judge of Midnapur, dated the 17th February, 1908.

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Held, that article 109, schedule II of the Limitation Act was applicable and that the plaintiff was entitled to mesne-profits for 3 years from 16th September, 1904 to the 16th September, 1907, the date of the suit : *Peary Mohun v. Khelaram* (1) followed : *Holloway v. Guneshwar* (2) not followed.

That the plaintiff was not entitled to deduct from the period of limitation the period from the 13th February, 1903 to 11th September, 1905.

Appeal by the Principal Defendant.

Suit for recovery of mesne profits.

The primary Court over-ruling the plea of limitation, held that the defendant No. 1 was liable for the mesne profits claimed. Against that decision, defendant No. 1 appealed. The following dissentient judgments were delivered :

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Doss, J.—The point for determination in this appeal is, whether the plaintiffs are entitled to mesne-profits for more than three years prior to the institution of the suit. The plaintiffs are the *putnidars* of certain Mouzas held under the zemindars called the Nandis. The plaintiffs having made default in the payment of *putni* rent for the year 1308 B.S., the zamindars applied to the Collector of Midnapur under Regulation VIII of 1819 for sale of the *putni taluk*. On the 29th October, 1901, the *putni taluk* was sold by the Collector and was purchased by the defendant No. 1. He obtained a certificate of sale and was duly put into possession by the Collector, such possession taking effect from the beginning of 1309 *amli* year corresponding to 15th September, 1901. On the 17th May, 1902, the plaintiffs instituted a suit under the provisions of that Regulation against the zemindars and the defendant for reversal of the sale on the ground of irregularity in the proceedings preliminary to the sale. On the 8th August, 1902, the sale was set aside by the first Court. On appeal by the defendants, that judgment was set aside by the Court of Appeal below on the 13th February, 1903. Thereupon the plaintiffs preferred a second appeal to this Court. On the 11th May, 1905, this Court set aside the judgment of the lower Court and remanded the case for a fresh decision. After remand the Court of appeal below on the 11th September, 1905, set aside the sale and decreed the suit of the plaintiffs. On second appeal by the defendants this Court affirmed the decision of the Court below on the 30th May, 1907.

On the 16th September, 1907, the plaintiffs instituted the present action for mesne profits for the *amli* years 1309, 1310, 1311 and 1312 B.S. At the trial they gave up their claim for mesne profits for the first six months of 1309.

(1) (1908) I. L. R. 35 Calc. 996; 8 C. L. J. 181.

(2) (1905) 3 C. L. J. 182.

The defendant No. 1 pleaded that he was not liable for mesne profits as he was in lawful and *bona fide* possession derived under the sale by the Collector, and that even if he was liable, the claim for mesne profits for the years 1309, 1310 and 1311 were barred by limitation. The Court below has overruled the plea of limitation and has held that the defendant No. 1 is liable for the mesne profits claimed. It has ordered a commissioner to be appointed to determine the amount of mesne profits for the last six months of 1309 and for the years 1310, 1311 and 1312. From this judgment the defendant has appealed.

It is not disputed that the mesne profits for the year 1312 are not barred by limitation. The only question in this appeal therefore is whether the mesne profits for the six months of 1309 and for the years 1310 and 1311 are barred by limitation. Article 109 of Act XV of 1877 provides that a suit for profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant must be brought within three years from the date when the profits are received, or, where the plaintiff has been dispossessed by a decree, afterwards set aside on appeal, when he recovers possession.

The amount of the rents and profits which have been received by the defendant during the year 1309 *amli* could not be ascertained until after the end of the year, and therefore such rents and profits could not be said to have been received by the defendant until the end of that year. See *Byjnath Pershad v. Badhoo Singh* (1). A too literal interpretation of the words "when the profits are received" would impose upon the plaintiff the somewhat unreasonable burden of proving what rents and profits the trespasser realized each day of the year. Then again the wrong-doer is not liable for all the rents and profits received during the year but only for the balance after deduction of the revenue or rent, as the case may be, payable for the land and the collection charges. Such balance evidently cannot be ascertained until the end of the year. Besides, the rule which requires that interest must be allowed on mesne profits year by year [see *Radharaman Munshi v. Surnomoyee Debi* (2); *Hurrodurga Choudhuran v. Sarat Sundari Debi* (3); *Brojendra Kumar Roy v. Madhab Chandra Ghose* (4) and *Girish Chandra Lahiri v. Sashi Shekhareswar Roy* (5)] proceeds on the basis that interest is to

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(1) (1868) 10 W. R. 486.

(2) (1905) I. L. R. 30 Calc. 506; 7 C. W. N. 437.

(3) (1881) L. R. 9 I. A. 1; I. L. R. 8 Calc. 332.

(4) (1882) I. L. R. 8 Calc. 343.

(5) (1905) I. L. R. 33 Calc. 329.

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be calculated on the aggregate amount of rents and profits ascertained at the end of each year. Furthermore, the ordinary rule according to which the person in wrongful possession of property is held liable not only for the profits actually received by him but also for the profits which he might with ordinary diligence have received therefrom, also points to the same inference, namely, that his liability does not begin until after the end of the year, for, until the year terminates, the amount of profits which he might with ordinary diligence have received cannot be ascertained. The *amli* year 1311 ended on the 20th September, 1904, and that date is within three years of the date of the institution of the present suit. Hence the claim for the mesne-profits of 1311 is not barred by limitation. The real question, in this case, therefore narrows itself down to the liability or otherwise of the defendant for the mesne-profits of 1310 and the last six months of 1309. The last day of 1310 corresponds to 2nd September, 1903 and that of 1309 to 13th September, 1902. The possession of the defendant commenced from the 15th September, 1901. Hence he has been in receipt of the rents and profits of the last six months of 1309 and for the whole of 1310. It is insisted on behalf of the appellants that this part of the claim is barred by provisions of article 109 of the Limitation Act for the reason that those profits were received more than three years before the date of the institution of the suit.

I am unable to accept this contention as sound. The words "the profits" in the third column evidently refer to the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. If the expression "when the profits are received" in the third column of article 109 be construed literally and be taken to refer to the respective dates when the profits are actually received by the defendants, the resulting anomaly would be very serious indeed. The period of limitation in the class of cases like the present would begin to run against the plaintiff, before the right to bring a suit for such profits has accrued to him. The right to bring the suit does not accrue unless and until it can be predicated of the receipt of the profits by the defendants that it is wrongful as against the plaintiff. The question therefore resolves itself into this, whether the profits of 1310 and 1309, though received at the end of these years, were at the dates when they were received, profits belonging to the plaintiff, which had been wrongfully received by the defendant, or, in other words, whether the defendant during those years was a trespasser and a wrongdoer and was in wrongful receipt of the rents and profits. The position

of the zemindar who brings about a sale of a *putni taluk* under Regulation VIII of 1819 was thus observed upon by their Lordships of the Privy Council in *Mussammat Rani Suruomoyee v. Sosheemukhi Burmonia* (1) "they do not concur in the view taken by the High Court, that the appellant, *i.e.*, the zemindar can be said to have committed an act of trespass, because when she pursued the remedy, which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act, and that her proceedings, therefore, become inoperative. Their Lordships cannot treat this as an act of trespass." If the zemindar in bringing about a sale under Regulation VIII of 1819 is not guilty of an act of trespass and is not a wrong-doer, even if he inadvertently omits any of the formalities prescribed by the Act, far less can the auction-purchaser who is put into possession by the Collector, or, in other words, who is installed into possession under the authority of law, be held to be guilty of trespass or in wrongful possession of the land and of the rents and profits thereof. In *Perumal Udayar v. Krishnama Chettyar* (2), certain profits having been sold for arrears of revenue under the Madras Revenue Recovery Act and the purchasers having been put into possession, the proprietor brought a suit to set aside the sale. A decree having been made in his favour, he brought a suit against the purchaser for mesne profits. The Madras High Court held, following the decision of the Privy Council in *Dakhina Mohan Roy v. Saroda Mohan Roy* (3), that the purchaser was in rightful possession until the decree was set aside, that he was not a trespasser and not liable to make good any loss sustained by the rightful owner by being kept out of possession, but was only bound to account for the mesne profits, *i.e.*, for all rents and profits which he had received or which without wilful default he might have received. In *Dakhina Mohan Roy v. Saroda Mohan Roy* (3), the plaintiff having obtained a decree for possession of a revenue paying estate, was put into possession in execution of the appellate decree of the High Court pending an appeal to the Privy Council. In order to protect the estate from sale, the plaintiff paid certain arrears of Government revenue. The decree of the High Court was afterwards reversed by the Privy Council and the defendant was restored to possession. The plaintiff then brought an action to recover from the defendant the sums which he had paid to satisfy the arrears of revenue. The decision of that question turned upon the character of the plaintiff's possession at

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(1) (1868) 12 M. I. A. 244.

(2) (1894) I. L. R. 17 Mad. 251.

(3) (1893) L. R. 20 T. A. 160; I. L. R. 21 Calc. 142.

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the time he made payments of Government revenue. Their Lordships of the Privy Council observed "it seems to be somewhat a strong thing to hold that the appellant," *i.e.*, the plaintiff, "when he paid the Government revenue, was in wrongful possession of the estate. He was in rightful possession at the time. He was in possession under the authority of the highest Court in India." These authorities clearly establish the proposition that if a person, whether an auction-purchaser or a party to a suit, is duly put into possession under the authority of law, whether by a Collector or a revenue officer or by a civil Court in a proceeding to which the owner of the property or the other party to the suit is a party, such possession is not wrongful until the sale is set aside by a competent Court, in a suit brought in pursuance of the statute under which the sale is held or until the decree under which the party was put in possession is reversed on appeal.

Article 12 of the Limitation Act (XV of 1877) contains by implication a legislative recognition of the condition of rectitude of the title of the purchaser derived under any of the sales mentioned therein, and held by a civil Court or a Collector or a revenue officer for it prescribes the short period of one year only from the date of confirmation of sale within which the injured proprietor is allowed to bring a suit to set aside the sale and regain his possession, on failure of which the title of the purchaser becomes unassailable.

No doubt if the decree under which a party is put into possession is passed without jurisdiction or if the sale is *ultra vires* the possession of the person who is put in possession under such a decree or the possession of the purchaser who is put into possession under the sale, is in contemplation of law wrongful and that from the moment the purchaser is put into possession. For a similar reason, if an owner of property is dispossessed in execution of a decree or order of Court to which he is no party, the possession of the person who is put in possession is just as wrongful as if the owner had been dispossessed by force or fraud; the owner in such case is entitled to recover possession and claim mesne profits from the moment the other party is put into possession because from that moment the possession of the latter is wrongful, as against the true owner. In such cases the person who takes possession cannot legitimately invoke the sanction of legal authority in justification of his possession. But such possession is not wrongful if the decree is passed by a Court of competent jurisdiction in a suit or proceeding to which he is a party or if the sale is held by an authority which

has jurisdiction to hold the sale, however irregular the proceedings which led to the sale may have been. It is only when the sale is finally set aside by a suit or the decree is finally reversed on appeal, that the possession by virtue of the ultimate judicial declaration becomes wrongful, not merely from the time when such declaration is pronounced but *ab initio* i.e., from the time the unsuccessful party or the purchaser was installed into possession. The rightful owner then becomes for the first time entitled to recover from the technical wrong-doer the mesne profits received by him for the whole period during which he had been in possession. It is from that time that the retention, by the wrong doer, of the profits so received by him becomes wrongful against the owner. It does not matter however long may have been the period during which he had received such profits. It is only after such final adjudication that all the profits received during the antecedent period can be said to have been wrongfully received by the defendant. If a suit for recovery of the *mesne profits* is brought within three years from the time when the receipt of such profits is finally pronounced by the Court to be wrongful, it would in my opinion be within the scope of article 109 of the Limitation Act. The principle which governs those cases is the same as that which underlies the fundamental and universally recognised doctrine of restitution illustrated in the cases of *Rodger v. Comptoir D'Escompte De Paris* (1), and *Shama Pershad Chowdhury v. Hurro Prosad Chowdhury* (2), in the matter of the petition of *Raj Kisen Singh* (3); *Hakum Chand v. Kamalanund* (4); *Raja Singh v. Kooldip Singh* (5) and *Radhey Singh v. Magni Ram* (6), and which is partially embodied in section 583, Civil Procedure Code, under that doctrine the injured party is completely restored to the position he would have occupied but for the decree which is subsequently set aside and the action of the primary Court in enforcing its decree and he is entitled to recover not only the land of which he had been put out of possession or the principal money which he had paid under the erroneous decree but also all mesne profits, interests, damages and compensations which are properly consequential on the reversal of the decree. The right to the restitution does not accrue until the ultimate reversal of the decree or order under which possession is lost or the money paid; when this right accrues, the owners are entitled to recover back all the profits which the person placed in possession

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(1) (1871) L. R. 3 P. C. 465.

(2) (1865) 10 M. I. A. 203.

(3) (1866) B. L. R. (F. B. R.) 605.

(4) (1905) I. L. R. 33 Calc. 927.

(5) (1894) I. L. R. 21 Calc. 989.

(6) (1902) 6 C. W. N. 710, (712).

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under the authority of the law may have derived from the property or the money which the unsuccessful party has received together with all the fruits derived from the enjoyment of the money. The real foundation of this right is thus explained in the following passage in the judgment of their Lordships of the Privy Council in *Rodger v. Comptoir D'Escompte De Paris* (1). "Now their Lordships are of opinion that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suits, and when the expression 'the act of the Court' is used it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of these tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

In addition to the provision I have already discussed, article 109 further enacts that where plaintiff has been dispossessed by a decree afterwards set aside on appeal, the period of limitation for a suit for the profits of immovable property belonging to the plaintiff which has been wrongfully received by the defendant is three years when the plaintiff recovers possession.

In such a suit the plaintiff recovers *mesne profits* not only for three years prior to the institution of the suit but for any number of years during which the defendant may have been in possession. And why? Because, as the words of the article in the first column themselves plainly indicate, unless and until the decree under which the defendant is placed in possession is reversed in appeal, plaintiff cannot claim the mesne profits as belonging to him and as having been wrongfully received by the defendant. It is then and then only that the retention of the mesne profits by the defendants becomes wrongful as against the plaintiff. The case of *Krishna Nand v. Kunwar Pertab Narayan Singh* (2) relied on by the appellants is clearly distinguishable. There the plaintiff, who was a sub-settlement-holder of certain villages, had been dispossessed by the manager under the Oudh Talukdars' Relief Act, acting not in any judicial or quasi-judicial capacity, but on behalf of the then owners of the estate, which, however, was subsequently adjudged to belong to the defendant. It was contended on behalf of the appellant that the manager under the Oudh Talukdars' Relief Act was acting, as it were, judicially, and therefore the suit came under the words of the

(1) (1871) L. R. 3 P. C. 465 (485).

(2) (1884) I. L. R. 10 Calc. 785.

second paragraph in the third column of the article. Their Lordships of the Privy Council pointed out in the course of the argument that the contention was manifestly untenable, and it was accordingly abandoned by counsel. The act of dispossession by the manager was an act possessing the same legal character as an act of dispossession by any private individual. The plaintiff brought the previous suit not for setting aside the act of dispossession, indeed no such suit could be maintained but for a declaration of his title and for recovery of possession. When however a Collector sells an estate for arrears of revenue or a *putni taluk* for arrears of rent, the defaulting proprietor or talukdars cannot recover possession from the purchaser at the sale unless the sale is cancelled by a suit instituted for that purpose and that within the short period of one year prescribed by law. The sale is good and confers a valid title to the purchaser until it is judicially declared to be bad, whereas the act of dispossession by the manager in the case was unwarrantable and bad from the very beginning.

It may perhaps be useful to point out that the words "settlement officer" before the words "or the manager acting under the Oudh Talukdars' Relief Act" at page 791 of the report probably crept into the judgment *per incuriam*, because it was the manager acting under the Oudh Talukdars' Relief Act and not the settlement officer who had dispossessed the plaintiff. In fact the settlement officer had tried and decreed the previous suit for possession brought by the plaintiff after dispossession by the manager.

The foregoing considerations in my opinion lead to the conclusion that the mesne profits for the last six months of 1309 and for the whole of 1310 and 1311 are saved from limitation.

I am of opinion that the judgment of the Court below is right, though not for the reason assigned by it and that this appeal should accordingly be dismissed with costs.

Richardson, J.—This appeal is preferred by the principal defendant in a suit for the mesne profits of a *putni* mehal within the estate of certain persons whom the learned Subordinate Judge calls the Nandis. The plaintiffs in the suit may be conveniently described as the *putnidars*. They are the respondents before us and the term where necessary will be used, so as to include such of the persons under whom they claim as come as actors into the course of the narrative: at the instance of the Nandis the *putni* was sold by the Collector under Regulation VIII of 1819 and was purchased by the defendants who took possession, it is said, with effect from the beginning of the year 1309 (September, 1901).

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On the 17th May, 1902, the *putnidars* instituted a suit to have the sale set aside. They obtained a decree from the Subordinate Judge on the 18th August, 1902. The decree was reversed by the District Judge on the 13th February, 1903, but on second appeal the suit was remanded on the 11th May, 1905. On remand the District Judge set aside the sale on the 11th September, 1905 and an appeal to the High Court was dismissed on the 30th May, 1907. The present suit was instituted on the 16th September, 1907, the *putnidars* claiming mesne profits for the four years from 1309 to 1312 inclusive. In the lower Court they abandoned their pretensions to mesne profits for the first six months of 1309. It is not clear why they did so. Possibly their intention was to exclude mesne profits for the period antecedent to the institution of their suit to set aside the sale: *Mewa Kuar v. Banarsi Prosad* (1). The only question which arises is whether the balance of claim so far as it relates to such period as precedes the three years next before the filing of the plaint is barred by limitation under Article 109 of the second schedule to the Limitation Act XV of 1877.

The Learned Subordinate Judge has answered this question in the negative relying on the case of *Lakhan Chandra-Sen v. Madhusudan Sen* (2). It is conceded here that the second part of Article 109 has no application: *Krishna Nand v. Kunwar Pertab Narayan Singh* (3). But it was contended as I gathered that the *putnidars* are entitled to deduct the period between the 13th February, 1903 when as it afterwards appeared the District Judge wrongly affirmed the sale of the *putni* and the 11th September, 1905, when he set aside the sale. It is argued as I understand that the right to sue for mesne profits was lost during this period owing to a mistake made by the District Judge and that the law of limitation should therefore be regarded as inoperative or in suspense during the same period. In my opinion however the authority referred to by the Subordinate Judge does not cover the circumstances of the present case. The *putnidars* might have asked for the mesne profits for which they are now suing in their previous suit, and might thus have kept their rights alive. But apart altogether from any question of hardship, there would appear to be no escape from the plain language of the first part of Article 109 and the authorities referred to before us appear to me to be beside the point. The case of *Amrita Sekhar Banerjee v. Bejoy Chand Mahtab* (4), decides no question of limitation. The cases of *Hem Chandra Chowdhury v. Kali Prosanno*

(1) (1895) I. L. R. 17 All. 533.

(2) (1907) 7 C. L. J. 59; I. L. R. 35 Cal. 209.

(3) (1884) I. L. R. 10 Cal. 785.

(4) (1905) 4 C. L. J. 547.

Bhaduri (1), and *Raja Rangayya Appa Rao v. Bābba Sriramula* (2), which were decided by the Privy Council, relate to claims for rent and are clearly distinguishable. The former case is merely an instance of the application of the provisions of section 14 of the Limitation Act. It is not contended that those provisions apply here. The latter case is an authority in regard to the time at which in certain circumstances and with reference to other provisions of the law, rent may be said to become due. The case of *Mussammāt Rani Surnomoyee v. Sosheemukhi Burmonia* (3) also related to rent. The *putnidars* in that case recovered *mesne profits* in the suit to set aside the sale of the *putni* and were afterwards sued for rent and it was held that the suit was not barred by the language of section 32 of Act X of 1859. That section too speaks of the time when an arrear of rent "shall have become due." None of these cases dealt with the language of Article 109 or with language of similar import. The article requires that a suit for *mesne profits* should be brought within three years from the time when the profits are received. To my mind there can be no doubt as to the time when the profits were received which the *putnidars* seek to recover and I think that the claim for profits received before the three years next before the filing of the plaint is barred. Principles founded on justice, equity and good conscience are subject to specific rules of law: *Dakhina Mohan Roy v. Saroda* (4). It was ultimately decided in the previous suit that the defendant had no right to be in possession and that had been throughout the contention of the *putnidars*. That is the foundation of their claim for *mesne profits* and they cannot have it both ways. I can find no sufficient reason for saying that during any part of the time covered by the suit the operation of the rule of limitation applicable was suspended.

As I have said, it was open to *putnidars* to include action for past and future *mesne profits* in the suit which they instituted in 1902: (See in this connection section 211 of the Civil Procedure Code of 1882). Not having done so, they can scarcely complain of hardship now. *Rani Surnomoyee's* case (3), was distinguished for somewhat similar ground in *Buroda Kant Roy v. Chunder Coomer Roy* (5). No doubt the *putnidars* are not precluded merely by the fact that they did not ask for future *mesne profits* in the suit of 1902 from

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(1) (1903) I. L. R. 30 Calc. 1033 ; 8 C. W. N. 1.

(2) (1908) I. L. R. 27 Mad. 143 (P. C.) ; 8 C. W. N. 162.

(3) (1868) 12 M. I. A. 244.

(4) (1893) I. L. R. 20 I. A. 160 ; I. L. R. 21 Calc. 142.

(5) (1875) 23 W. R. 280.

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now claiming them (penultimate paragraph of sec. 244 of the old Civil Procedure Code). But the claim as now preferred is confronted with a difficulty which, had the course suggested been taken, would not have arisen: *Raja Bhup Indar Bahadur Singh v Bijai Bahadur Singh* (1). This last case at p. 215 contains incidentally an indication of the meaning which their Lordships attach to Art. 109 and so far as it goes, supports the view I have ventured to express. The cases of *Mahmud Riasat Ali v. Husin Banu* (2); *Kalka Singh v. Paras Ram* (3), and *Abbas v. Fasihuddin* (4), may also be referred to in further support of that view. I have already referred to *Krishna Nand's case* (5).

In my opinion therefore this appeal should be allowed (in the circumstances of the case without costs) and the decree of the learned subordinate Judge should be amended accordingly. I may add that it may be that as a matter of convenient practice, mesne profits are often regarded as actually received at the end of the year in which they accrue and that for the purpose of calculating interest they are always so regarded. The difficulty however of laying down any general rule for all purposes is illustrated by the claim which the *putnidars* make in the present case for the profits of the last six months of 1309. It would seem that the question what particular profits should be excluded or included should be settled after enquiry with reference to the facts of each case.

The principal Defendant thereupon preferred an appeal under clause 15 of the Letters Patent.

Babus Mahendra Nath Ray and *Mohini Mohon Chatterjee* for the Appellant.

Dr. Dwarka Nath Mitter and *Babu Satowripati Roy* for the Plaintiffs Respondents.

Babus Baidya Nath Dutt and *Mohini Nath Bose* for *Proforma* Defendants Respondents.

The judgements of the Court were as follows:

August, 21.

Sanderson, C. J.—This is an appeal under the Letters Patent in respect of an appeal in which Mr. Justice Doss and my learned brother Mr. Justice Richardson differed in opinion.

The judgments were delivered so long ago as June 1909. Both the judgments were read by Mr. Justice Richardson, because, as we

(1) (1900) L. R. 27 I. A. 209; 5 C. W. N. 52.

(2) (1893) L. R. 20 I. A. 155 (159); I. L. R. 21 Calc 157.

(3) (1894) I. L. R. 22 Calc. 434 (443) (P. C.)

(4) (1897) I. L. R. 24 Calc. 413. (5) (1884) I. L. R. 10 Calc. 785.

have been informed, on that date Mr. Justice Doss was away on leave: and, apparently some doubt arose as to whether the judgment of Mr. Justice Doss was a valid judgment, having regard to the fact that was read by my learned brother Mr. Justice Richardson when Mr. Justice Doss was away from Court on leave, and apparently this matter was left in abeyance for many years. It was brought before my learned brother Mr. Justice Mookerjee and me last year,* and it was argued on the one hand that Mr. Justice Doss's judgment was a valid judgment and on the other that it was not a valid judgment. We came to the conclusion that it was a valid judgment and consequently the appellant would have had a right of appeal under the Letters Patent, if he had appealed within the proper time, and, having regard to the special facts that were stated to us at that time, that the time for appealing should be extended and we did extend it. The result was that this appeal was presented to Court and it has now been heard by us. I think it was necessary to state those facts and to show how this very considerable delay in this case has arisen.

Now, the suit in which this appeal arises was a suit brought by the plaintiff for mesne profits in respect of the *amli* years 1309, 1310, 1311 and 1312. I might say at this stage that the claim in respect of the earlier half of the year 1309 was given up by the plaintiffs at some stage of the proceedings. The learned subordinate Judge decreed the suit, and declared that the plaintiffs were entitled to get mesne profits from the last six months of 1309 to 1312, and that a commissioner should be appointed to take accounts from the papers filed by the plaintiffs and from other necessary papers and that the amount paid by the auction-purchaser on account of the 1311 rent and the costs of realisation should be set off against the money due to the plaintiffs, and that the case should be brought up again before him after the commissioner's report had been received. From that decision the defendant no. 1 appealed:—That was the appeal which was heard by Mr. Justice Doss and my learned brother Mr. Justice Richardson. The point which arose upon the appeal was as to the Limitation Act. The defendants contended that the plaintiffs were not entitled to recover any mesne profits except those which were received or which ought to have been received without wilful default, within three years prior to the institution of the suit.

The facts which are material to be stated in this matter are as follows: It appears that in October 1901, the property in question

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* See, (1916) 23 C.L. J. 592—Rep.

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was bought by the defendant No. 1 at an auction sale held under Patni Regulation VIII of 1819. He was put into possession in September (the auction sale took place, I understand, in October but the possession was taken as from September 1901). On the 17th of May 1902, the plaintiffs sued the defendants to set aside the sale. In that suit they made no claim for mesne profits which had accrued either before the suit or which accrued during the pendency of the suit. On the 18th of August 1902, the suit was decreed in the first Court, with the result that the sale was set aside. Then there was an appeal which was heard by the District Judge; and, on the 13th. of February 1903, the District Judge reversed the decree of the Subordinate Judge, with the result that the sale was affirmed. Then there was an appeal to the High Court and on the 11th of May, 1905, the High Court remanded the case for further consideration and decision, to the District Judge. On the 11th of September, 1905, the District Judge affirmed the decision of the Subordinate Judge, with the result that the sale was set aside. Then there was a further appeal to the High Court, which was heard on the 30th of May, 1907, and the appeal was dismissed, the result of course being that the decree setting aside the sale was upheld.

This suit was brought on the 16th of September 1907; and, the learned vakil for the defendant No. 1 has urged that the plaintiffs are not entitled to recover any mesne profits which accrued, and which were received or which might have been received prior to the 16th day of September 1904. I might point out that inasmuch as the claim was made with reference to the *amli* years, September, 1902, might be taken to be the beginning of 1309, September 1903 to be the beginning of 1310; September 1904 to be the beginning of 1311; September 1905 to be the beginning of 1312.

The first point that arises in respect of this matter is whether article 109 of the Limitation Act which is applicable to this case, namely, Act XV of 1877, applies to this case.

The learned vakil for the plaintiffs has argued that article 109 is not applicable and his ground was that article 109 applies to profits of immovable property belonging to the plaintiffs which have been wrongfully received by the defendant, and his point was that inasmuch as the defendant was put in possession in consequence of the sale which was held under the Putni Regulation, the defendant's possession could not be held to be wrongful; in other words, the defendant could not be held to be a trespasser, and that consequently the mesne profits which the defendant received prior to the 11th of September, 1905, were not wrongfully received.

He further urged that the matter ought to be looked upon as if the defendant had obtained possession in pursuance of a proceeding under the Regulation which was of a semi-judicial nature. With that I cannot agree. As I have already said, possession was obtained by the defendant under the sale which was held under the Putni Regulation. Our attention was drawn to that Regulation this morning : and, it is clear that in this case there was no order of the Court for the sale : the sale was held by the appointed officer, and possession was given as I assume by the zemindar in accordance with the provisions of clause 15 of the Regulation. But there still remains the question whether the point is right which the learned vakil has argued, namely that article 109 does not apply because it cannot be said that the profits were wrongfully received. In my judgment article 109 does apply. I think that it is clear that when we look at the third column of the schedule, we find that even if the possession had been obtained under a decree of the Court which was afterwards set aside on appeal, this article would have applied, and the profits would have been said to have been wrongfully received. *A fortiori* when possession was obtained by the defendant under the sale held under the Regulation to which I have referred, article 109 would apply. I am confirmed in that opinion by a judgment of this Court in the case of *Peary Mohon Roy v. Khelaram Sarkar* (1), where the facts are very similar to the facts of this case. In that case "a *patni mehal* was sold under Regulation VIII of 1819 for arrears of rent on the 18th May, 1900, when the defendant-purchaser came into possession. The plaintiff-owner of the *patni* instituted a suit for setting aside the sale and obtained a decree and took possession on the 11th September, 1901 : The plaintiff then instituted the present suit on the 6th April, 1904, for mesne profits for the period the defendant was in possession, *viz.*, from 18th May, 1900 to 11th September, 1901 : It was held that the defendants wrongfully received profits, which were receivable by the plaintiff. Article 109 and not article 120 governed the case, and the claim for the period (18th May, 1900 to 5th April, 1901) preceding the three years next before the institution of the suit was barred by limitation." I think that is a case directly in point, and I agree with the decision that was arrived at in that case.

Further, there is another case : *Krishna Nand v. Kunwar Pertab* (2), to which we have been referred. Although in that case the property was not sold under the Regulation which was used in

(1) (1903) I. L. R. 35 Cal. 996. (2) (1884) I. L. R. 10 Cal. 785.

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this case and also in the case of *Peary Mohon v. Khelaram* (1), and the defendant there was put in possession by the settlement officer at the instigation of the manager under the Talukdars' Relief Act, XXIV of 1870, the principle of the decision applies to this case. It was there held that the mesne profits which were recoverable were those which had been received within three years prior to the suit.

Our attention was drawn to a case *F. H. Holloway & others v. Guneshwar Singh & others* (2), and that was relied upon by the learned vakil for the respondent. I do not think that we are bound by that decision, because the learned Judges who decided that case were of opinion that although the sale had been set aside the order by reason of which the sale had been held and the order for possession had not in fact been set aside, and consequently they came to the conclusion that the profits which had been received while the defendant was in possession were not wrongfully received. It is not necessary for me to say whether I agree with that or not : all that I wish to draw attention to is that inasmuch as that was one of the grounds of the decision, it is really not a decision which is binding on this Court : and I may further point out that this case was decided by Mr. Justice Henderson and Mr. Justice Mitter, and Mr. Justice Mitter himself was a party to the judgment in *Peary Mohon v. Khelaram* (1) to which I have referred, and that decision was given three years after the decision in *Holloway v. Guneshwar* (2), and that decision, as I have already said is directly in point in this case, and with it I agree.

For these reasons I am of opinion that article 109 applies to this case, and that subject to two other points which the plaintiffs have raised, the plaintiffs would not be entitled to recover any mesne profits except those which had in fact been received or which ought to have been received without wilful default, within three years before the institution of the suit.

The second point raised by the learned vakil was that the District Judge on the 13th of February, 1903, by his judgment affirmed the sale and that that judgment was not finally disposed of until the 11th of September, 1905, and that therefore during the period from the 13th of February, 1903 to the 11th of September, 1905, the defendant was rightfully in possession and that the plaintiffs although they might have brought a suit on the 12th of February, 1903, to recover mesne profits after the 13th of February,

(1) (1908) I. L. R. 35 Calc. 996.

(2) (1905) 3 C. L. J. 182.

they could not have so brought their suit until the 11th of September, 1905, because the sale had been upheld by the Court and the learned vakil asked us, to use his own expression, to deduct from the period of limitation that period of time from the 13th of February, 1903 to the 11th of September, 1905. In my judgment we cannot do that. We have to apply the Limitation Act as it stands, and the limitation provided by article 109 is to the effect that the period of limitation begins to run from the time when the profits are received; and, for that reason I think the second point which was raised by the learned vakil is not a good point.

The third point which the learned vakil raised was that usually the mesne profits could not be ascertained until the end of *amli* year and that consequently the liability for such mesne profits would not begin until the end of the *amli* year. The result of that argument, if it was upheld, would be that the plaintiffs would be entitled to mesne profits not only for the year 1312, which was admitted by the learned vakil for the appellant but also for the year 1311. In my judgment we have nothing to do with that on this occasion, and as I have said we have to apply article 109: All we can say is that the plaintiffs are only entitled to recover rents and profits which the defendant had received and which without wilful default he might have received between the 16th of September, 1904, and the date of the suit (the 16th of September, 1907). Consequently the judgment of the learned Subordinate Judge ought to be varied in the way. I have indicated in my judgment, and the enquiry by the commissioner directed by the learned Subordinate Judge's judgment ought to take place upon that basis forthwith.

The appeal is allowed with costs both of the hearing before Mr. Justice Doss and Mr. Justice Richardson as well as before us.

The appellants must pay the *pro forma* defendants three gold mohurs as their costs in this Court.

Teunon, J.—I agree.

Walmsley, J.—I agree.

A. T. M.

Appeal allowed.

CIVIL.

1917.

Saraj

v.

Prem Chand.

Sanderson, C. J.

Before Mr. Justice D. Chatterjee and Mr. Justice Walmesley.

CIVIL.

1916.

December, 6, 7, 21.

PANCHANON MAJUMDAR

v.

BINOY KRISHNA BANERJEE.*

Hindu Law—Adoption—Anti-adoption agreement between adoptive mother and natural father, if binding on the minor—Contract, if void.

Anti-adoption agreements by the adoptive mother with the natural father and operating in the restriction of the rights of the adopted son are valid only if they amount to fair and reasonable arrangements for the enjoyment of her husband's property by the widow during her life-time, especially when there is authority from the husband in that connection. The contract is not, however, absolutely void and can be ratified by the minor.

Bhasba Rabidat Singh v. Indar Kunwar (1); *Visalakshi Ammal v. Sivaramien* (2); *Vyasacharya bin Narayanacharya v. Venkubai Kom Ranga-charya* (3); and *Bepin Behari Bundopadhyaya v. Brojonath Mookhopadhyaya*, (4) referred to.

Appeal by the Plaintiff.

A Hindu widow entered into an agreement with the natural father of her prospective adopted son, by which it was agreed that after adoption she would receive a certain sum by way of maintenance, and an additional sum for the marriage of her relations, and that a further sum of Rs. 25 per mensem would have to be paid to her brother's son and grandson each during their life-time. The amounts were regularly paid during the life-time of the widow, and after her death the guardian of the minor adopted son stopped payment. The brother's grandson of the widow brought the present suit for enforcing the contract against the adopted son, and the suit was dismissed by both the primary Court and the lower appellate Courts.

Dr. Sarat Chandra Basack and *Babu Bankim Chandra Mukherjee* for the Appellant.

Babu Tarakeswar Pal Chaudhury for the Respondents.

C. A. V.

The following judgments were delivered:

December, 21.

D. Chatterjee, J.—A Hindu widow before making an adoption made an agreement with the natural father of her prospective adopted son that she was to receive a certain amount for her maintenance

*Appeal from Appellate Decree No. 519 of 1915, against the decision of E. Panton Esq., District Judge of Murshidabad, dated the 14th January, 1915, affirming that of Babu Chandra Bhusan Banerjee, Subordinate Judge of Murshidabad, dated the 22nd January 1914.

(1) (1888) I. L. R. 16 Calc. 556.

(2) (1904) I. L. R. 27 Mad. 577.

(3) (1912) I. L. R. 37 Bom. 251.

(4) (1882) I. L. R. 8 Calc. 357.

and a certain amount for the marriage of her relations: and Rs. 25 per mensem each was to be paid to her brother's son and grandson during their lifetime. These amounts were regularly paid so long as the widow was alive but on her death payment was stopped by the guardian appointed by the District Judge. The present appeal arises out of a suit by the brother's grandson of the widow for enforcing the contract against the adopted son. Both the Courts below have dismissed the suit. Hence this appeal.

The plaintiff's case was that the allowance was sanctioned by the will of the defendant's adoptive father—that he and his uncle were receiving their allowances from before the adoption and the giving of the allowance was the condition on which the adoption was made and would not have been made but for it.

The defendant's plea was that he was not bound by the contract of his father.

The alleged will of the adoptive father has not been proved to be genuine and even if it were, its terms cannot be read as sanctioning the allowance to the plaintiff. Plaintiff's case therefore must stand or fall by the contract of the natural father with the adoptive mother.

There is some divergence of judicial opinion on the general question whether ante-adoption agreements entered into by the natural father of an adopted son and operating in restriction of his legal rights as an adopted son are binding on him. Their Lordships of the Privy Council have expressed a leaning against the binding nature of these agreements: See *Bhasba Rabidat Singh v. Indar Kumwar* (1). This was a case however of an agreement made in violation of the terms of the will of the husband by which the authority to adopt was given and the real question for decision before their Lordships was the validity of the adoption, the contention being that the adoption was invalid by reason of the agreement which restricted the rights of the adopted son. In the case of *Visalakshi Ammal v. Sivaramien*, (2) a Full Bench of the Madras High Court held, that, an agreement with the adoptive mother by which the natural father agreed before adoption that in case of a difference she would enjoy half the estate of her husband for life, the adopted son getting it on her death, was valid and binding: the real test in these cases being whether the arrangement was fair and reasonable.

In the case of *Vyasacharya bin Narayanacharya v. Venkubai Kom Rangacharya*, (3) a Full Bench of the Bombay High Court

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(1) (1888) I. L. R. 16 Cal. 556.

(2) (1904) I. L. R. 27 Mad. 577.

(3) (1912) I. L. R. 37 Bom. 251.

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has held that a gift by the widow of a portion of her husband's estate to her daughter and assented to by the natural father of a subsequently adopted son at the time of the adoption, is not binding on the adopted son. This was a case of an alienation by the widow which would not bind reversioners if there were no adoption, as she was dealing with more than her life interest. There is no case exactly in point in Bengal. The case of *Bepin Behari Bundopadhyaya v. Brojonath Mookhopadhyaya*, (1) was that of an adoptive father authorising his widow to hold possession for her life and the natural father giving away his son with the knowledge of the restriction. The case of *Horendranath v. Sibasoondari*, (2) is also of the same nature as the adoptive father made a similar restriction by his will.

These cases do not seem to take the case further than validating fair and reasonable arrangements for the enjoyment of her husband's property by the widow during her life-time, especially when there is authority from the husband in that connection. The broad proposition therefore that all anti-adoption agreements by the adoptive mother with the natural father and operating in the restriction of the rights of the adopted son are valid cannot be supported, and it is hardly necessary in this case to go into further detail in this matter. The allowance in dispute was paid during the life-time of the widow and the objection is made after her death. There is no alienation by her of her husband's property. She has with the consent of the natural father tried to impose a personal contract upon the minor. Neither she nor the natural father had any legal authority to do so. It is true that the contract is not absolutely void and could have been ratified by the minor but he has not. In this view of the case we dismiss the appeal with costs.

Walmsley, J.—I agree.

A. N. R. C.

Appeal dismissed.

(1) (1882) I. L. R. 8 Calc. 357.

(2) Appeal from Original Decree No. 268 of 1907 decided by Chitty and Richardson JJ. on the 24th of August 1909.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Walmsley.*

NOWRUNG SING

v.

JANARDAN KISOR LAL SINGH DEO AND ANOTHER.*

*Ejectment—Lease, forfeiture of—Rent, non-payment of—Rent for two consecutive
years—Waiver—Transfer of Property Act (IV of 1882), Secs 111 (g)—Overt
act—Institution of suit.*

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If rent is claimed for two consecutive years, ejectment cannot be decreed on the ground of forfeiture incurred at the end of the first year, because the very fact that rent is claimed for the second year, shows conclusively that the forfeiture, if any, incurred at the end of the first year, has been waived by the landlord.

Where the rights and obligations of the parties are regulated by section 111(g) of the Transfer of Property Act, there is no determination of a lease by forfeiture, immediately on breach of covenant, but the lessor is required to do some act thereafter showing his intention to determine the lease; in other words, the breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law.

Institution of a suit for ejectment is not regarded as a requisite act to show an intention of a landlord to determine the lease within the meaning of section 111(g) of the Transfer of Property Act. The forfeiture must be complete and the lease must be determined before the commencement of action for ejectment. The act, however, need not be a formal notice to quit, and may be a demand for possession, oral or written; what is essential is an overt act, which intimates to the tenant the intention of the landlord to determine the lease.

Appeal by the Defendant.

Suit for arrears of rent and for ejectment.

The material facts and arguments appear from the judgment.

Babus Bepin Behary Ghosh and Gobinda Chunder Dey Roy for the Appellant.

Babu Ram Charan Mitra for the Respondents.

The judgment of the Court was delivered by

C. A. V.

Mookerjee, J.—This is an appeal by the defendant in a suit for arrears of rent of a colliery held by him under the plaintiffs on the basis of a lease, dated the 28th September, 1901. The plaintiffs seek to recover their dues in respect of the years 1313 to 1317 B.S. and pray for ejectment of the defendant on the ground

May, 22.

* Appeal from Original Decree No. 481 of 1914, against the decree of Babu Asutosh Ghosh, Subordinate Judge of Burdwan, dated the 19th June, 1914.

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that, according to the terms of the contract between the parties, the lease has been forfeited by non-payment of rent. The Subordinate Judge has decreed the suit. His decision has been assailed in this Court on two grounds, namely, first, that a larger sum has been allowed to the plaintiffs than what is really due to them, and, secondly, that, on the face of the plaint, the claim for ejectment cannot be sustained.

The first point is sought to be established in two ways, namely, first, that credit should have been allowed for a sum of Rs. 1,500, and, secondly, that abatement of rent should have been allowed in respect of seven instead of six bighas. There is no force in either of these contentions. Upon the facts found by the Subordinate Judge, it is plain that the sum of Rs. 1,500 paid by the defendant had been rightly appropriated by the plaintiffs in satisfaction of their dues for an earlier period. As regards the amount of abatement legitimately allowable, we see no reason to differ from the Subordinate Judge as to the quantity of land acquired by the Railway Company. In our opinion, the amount decreed by the Subordinate Judge is recoverable by the plaintiffs from the defendant.

The second point raises an important question of law and requires careful consideration. The lease contains the following clause:

"We will pay the whole amount of the rent, year by year, by the 30th of Chaitra. If by non-payment of rent, we keep a cowri thereof unpaid, you will have power, in the beginning of the month of Bysack of the next following year, to take khas possession of the whole land lying within the undermentioned boundaries, including the coal mine thereon made by us, by your own authority, and settle the same with another tenant and realise the amount of arrears with interest, from our properties, movable and immovable, standing in our own names or benam and from our persons."

The plaintiffs contend that as default was made in the payment of rent, the tenancy has been forfeited, and they have become entitled to possession of the property demised. The Subordinate Judge has given effect to this contention. We are of opinion that his decision overlooked more than one elementary principle. In the first place, no decree for ejectment can be made for non-payment of the arrears of four years. It is well settled that if rent is claimed for two consecutive years, ejectment cannot be decreed on the ground of forfeiture incurred at the end of the first year, because the very fact that rent is claimed for the second year, shows conclusively that the forfeiture, if any, incurred at the end of the first

year, has been waived by the landlord. Illustrations of this principle will be found in the cases of *Jogeshuri v. Mahomed* (1); *Sitanath v. Basudeb* (2); *K. anand v. Gunput* (3); and *Raj Mohan De v. Mali Lal Sahu* (4). In the second place, a decree for ejectment cannot be made in this case, even on account of default of payment of rent of the fourth year as, on the face of the plaint, there was no completed forfeiture of the tenancy at the date of the institution of the suit. The statutory provision on the subject is embodied in section 111 clause (g) of the Transfer of Property Act, and, may, for the purposes of this case, be enunciated in the following terms: "A lease of immovable property determines by forfeiture in case the lessee breaks an express condition, which provides that on breach thereof the lessor may re-enter or the lease shall become void; and *the lessor or his transferee does some act showing his intention to determine the lease*." This makes it plain that where the rights and obligations of the parties are regulated by section 111 (g) of the Transfer of Property Act, there is no determination of a lease by forfeiture, immediately on breach of covenant, but the lessor is required to do some act thereafter showing his intention to determine the lease; in other words the breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law. This view was adopted by this Court in the case of *Anandamoyee v. Lakshi Chandra* (5); which was accepted as a correct exposition of the law in *Kadir Bakhsh v. Prag Narain* (6). The distinction, as regards the question of forfeiture, between cases governed by the Transfer of Property Act and by other Statutes has been repeatedly pointed out in Madras, where it has been surmised that the requirement of a further act is probably a relic of the antiquated technicality of the Common Law which required the formality of re entry by the lessor of leased lands before the lease could be determined for breach of covenant (Warvellé on Ejectment, section 47, Newell on Ejectment chapter VIII, section 17); *Venkatramana v. Gundaraya* (7); *Padmanabhaya v. Ranga* (8); *Chengiah v. Damara* (9); *Korapalu v. Narayana* (10); *Ramakrishna v. Baburaya* (11); *Vidyapurna v. Rangappaya* (12); *Sivaram v. Alagappa*

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(1) (1886) I. L. R. 14 Calc. 33.

(2) (1900) 2 C. L. J. 540.

(3) (1911) 16 C. W. N. 104.

(4) (1915) 22 C. L. J. 546.

(5) (1906) I. L. R. 33 Calc. 339; 3 C. L. J. 274.

(6) (1912) 9 A. L. J. 794.

(7) (1908) I. L. R. 31 Mad. 403.

(8) (1910) I. L. R. 34 Mad. 161; 20 M. L. J. 930.

(9) (1912) 15 I. C. 445.

(10) (1913) I. L. R. 38 Mad. 445; 25 M. L. J. 315.

(11) (1912) 23 M. L. J. 715.

(12) (1913) 25 M. L. J. 486.

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Chetty (1). The requirements of the Transfer of Property Act are perfectly plain and its express provisions cannot be ignored or treated as surplusage, whatever may have been the history of the development of the law on the subject in England: *Goodright v. Calor* (2); *Evans v. Davis* (3); *Jones v. Carter* (4); *Fenn v. Smart* (5); *Baylis v. Le Gros* (6); *Roberts v. Davey* (7); *Serjeant v. Nush* (8); *Moore v. Ullcoats* (9); *Grimwood v. Moss* (10). It is further obvious that the institution of the suit for ejectment cannot be rightly regarded as the requisite act to show the intention of the landlord to determine the lease within the meaning of section 111 clause (g). The forfeiture must be completed and the lease determined before the commencement of the action for ejectment, for there must be a cause of action in existence antecedent to the suit: *Deo Nandan v. Meghu* (11). The act, however, need not be a formal notice to quit; and may be a demand for possession, oral or written; what is essential is an overt act, which intimates to the tenant the intention of the landlord to determine the lease. In the case before us, the plaintiff does not even allege such an act on the part of the landlords. Consequently, there is no escape from the position that the plaintiff does not disclose any cause of action for the claim in ejectment.

The result is that this appeal is allowed in part and the decree, in so far as it entitles the plaintiffs to eject the defendant, is cancelled, but it will stand in all other respects. Each party will pay his own costs in this Court.

A. T. M.

Appeal allowed in part.

(1) (1915) Mad. W. N. 845; 2 M. L. W. 946.

(2) (1780) 2 Doug. 477 (486).

(3) (1878) 10 Ch. D. 747 (763).

(4) (1846) 15 M. & W. 718; 71 R. R. 800.

(5) (1810) 12 East. 444.

(6) (1858) 4 C. B. N. S. 537.

(7) (1833) 4 B. & Ad. 664.

(8) (1903) 2 K. B. 304.

(9) (1908) 1 Ch. 575.

(10) (1872) L. R. 7 C. P. 360 (364).

(11) (1906) 1 L. R. 34 Calc. 57 (63).

Before Mr. Justice Fletcher and Mr. Justice Richardson.

KSHIROD GOBINDA CHOUDHURY AND OTHERS

v.

GOUR GOPAL DASS.*

Civil.

1917.

January, 12.

Bengal Tenancy Act (VIII of 1885), Secs 50 Cl. (a), 106—Suit instituted before Settlement officer—Transfer to civil Court—Appeal, if lies to the Special Judge—Fixity of rent, presumption of—Non-payment of rent for some years, if deprives the tenant of the benefit of the presumption.

Where a suit, instituted before a Settlement officer under section 106 of the Bengal Tenancy Act, was transferred under the first proviso of that section to a competent civil Court being the Court of the Munsiff.

Held that, although the suit was originally instituted before the Settlement officer, an appeal would not lie to the Special Judge against the decision of the Munsiff, but the competency of the civil Court would be ascertained under the Civil Procedure Code, and the attributes of the competency of that civil Court would follow from the transfer, and as such the Subordinate Judge had the jurisdiction to hear the appeal against the decision of the Munsiff.

A tenant can claim the benefit of the presumption arising under section 50 clause (2) of the Bengal Tenancy Act, although there was no payment of rent for some of the twenty years immediately before the institution of the suit.

Ahmed Ali v. Golam Guffoor (1) followed.

Appeal by the Plaintiffs.

Suit for correction of an entry in the record-of-rights.

The material facts will appear sufficiently from the judgment of Fletcher, J.

Babus Sarat Chandra Rai Choudhury and Jogendra Narain Masumdar for the Appellants.

Babu Broja Lal Chuckerbutty for the Respondent.

The following judgements were delivered :

Fletcher, J.—These are three appeals preferred by the plaintiffs against a decision of the learned Subordinate Judge of Pabna, dated the 23rd June, 1914, affirming the decision of the Munsiff of the same place. The suits are originally instituted under the provisions of section 106 of the Bengal Tenancy Act. The

January, 12.

* Appeal from Appellate Decree No. 3710 of 1914 (with analogous appeals Nos. 2955 and 3709 of 1914) against the decree of Babu Kunja Behari Gupta, Subordinate Judge, 1st Court at Pabna, dated the 23rd June, 1914, affirming that of Babu Rabindra Nath Dhar, officiating Munsiff, 1st Court, of Pabna dated the 23rd April, 1913.

(1) (1869) 11 W. R. 432.

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Revenue officer acting under the first proviso of that section transferred the suits to a competent civil Court, the competent civil Court being the Court of the Munsiff. From that decision, appeals were preferred to the lower appellate Court and from the decision of the lower appellate Court the plaintiffs have appealed to this Court.

The first point that has been urged in these appeals is that the learned Subordinate Judge had no jurisdiction to hear the appeals from the decision of the Munsiff in these cases. That seems to me to be an untenable argument. The case having been transferred under section 106 of the Bengal Tenancy Act to a competent civil Court, the competency of the civil Court would be ascertained under the Civil Procedure Code and the attributes of the competency of that civil Court, namely, that its decision would be subject to certain rights of appeal, would follow from the transfer. The argument that has been put forwarded in these appeals on behalf of the plaintiffs appellants, namely, that there could only be appeals in these cases to the Special Judge because the suits were instituted before the Settlement officer has clearly no foundation on the wording of the Act.

The other point has been raised is as to whether the tenants could claim the benefit of the presumption arising under section 50 of the Bengal Tenancy Act. These tenants who have been entered in the record-of-rights as tenants holding at a fixed rate of rent appear to have purchased their holdings from the former tenants. The suits which we are now considering in appeal were brought to rectify the entries that these tenants were holding at a fixed rate of rent. The record of rights was, therefore, clearly in favour of the tenants and, when the matter came on for hearing in the lower appellate Court, the Judge made this finding:—"The presumption of section 103 B (5) is also in defendants' favour and the plaintiff has not been able to rebut it." Clearly, therefore, the Judge found, amongst other things, acting on the presumption under section, 103 B (5), that the tenants were raiyats. Having found that they were raiyats, he was entitled to address himself to the terms of section 50 (2). Section 50 (2) enacts that "if it is found in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement." Now, what appears in these cases is that, for many years prior to the purchase by the

defendants, rents had been paid by the tenants at a uniform rate and that, for the 8 or 9 years that have elapsed since the purchase by the defendants, no payment of rent has been made. The Judge, therefore, found that the rent had not been changed during the twenty years immediately before the institution of suits. In my opinion, the Judge was clearly entitled to do so. The decision in the case of *Ahmed Ali v. Golam Gufloor* (1), is clearly to that effect and I think that the following remarks made by Mr. Justice Dwarkanath Mitter in the course of his judgment conclude the matter:—"We frequently find that, in dealing with this presumption, the Courts below, instead of addressing themselves to the real question at issue, namely, whether the rent has been changed or not, confine their enquiry to one point, namely, whether one uniform rate has been paid or not. There may be cases in which a raiyat might not have paid his rents for many years prior to the institution of the suit for enhancement; but if there has been no change in the rent payable by him, he is not to be deprived of the presumption which the law has expressly laid down for his benefit. The payment at a uniform rate is one mode of showing that the tenure was held at a uniform rate; but what is only a particular mode of proceeding to the solution of a question ought not to be confounded with the question itself." These remarks seem to me to apply just as much to the terms of the present Act as to the Act of 1859 and the view of the learned Judge whose opinion I have cited seems to me to be the only possible view to take upon the words of the section. That being so, the learned Subordinate Judge in these cases was clearly entitled to come to the conclusion as he did that, during the twenty years immediately before the institution of the suits, the defendants and their predecessors in interest had held at a rent or rate of rent which had not been changed from the time of the Permanent Settlement. Having made that finding under sub-section (2) of section 50, by virtue of the presumption contained in sub-section (1) of the same section, the tenants were deemed to have held at a rate of rent which had not been changed from the time of the Permanent Settlement and, as such, they were not liable to have their rents enhanced. That obviously comes within the definition of a raiyat holding at a fixed rate as mentioned in section 4 sub-section (3) (a). A tenant so holding is a raiyat holding at a rate of rent that is fixed in perpetuity. That being so, the decision arrived at by the learned Judge of the Court of appeal below is, in my opinion, correct. The present appeals therefore, fail and ought to be

(1) (1869) 11 W. R. 432

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dismissed. The respondents in appeals Nos. 3709 and 3710 are entitled to their costs in these appeals. There will be no order as to costs in appeal No. 2955 as the respondent does not appear in that appeal.

Richardson J :—I agree.

A. N. R. C.

Appeals dismissed.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

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1917.

July, 17,
August, 28.

LAKHI CHARAN SAHA AND OTHERS

v.

HAMID ALI AND OTHERS.*

Revenue Sale Law (Act XI of 1859), Sec. 17, proviso—'Protected interest'—Occupancy raiyat obtaining grant of fixed rent—Occupancy raiyat at fixed rent under old law.

A person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right; such a person is protected from ejectment, under section 37 of the Revenue Sale Law.

Bhut Nath v. Surendra (1) explained. *Abdul Gani v. Makbul Ali* (2) followed.

A raiyat who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy raiyat although his rent has been fixed in perpetuity by reason of which he becomes a raiyat holding at fixed rates according to the classification of raiyats in the Bengal Tenancy Act.

Appeal by the Plaintiffs.

Suit for ejectment.

The material facts appear from the judgment.

Babus Dharendra Lal Kastgir and *Joges Chandra Bose* for the Appellants.

Babus Mohendra Nath Ray, Monmatha Nath Ray and *Kshitish Chandra Sen* for the Respondents.

C. A. V.

* Appeal from Appellate Decree No. 1883 of 1912, against the decree of J. Phillimore Esq. District Judge of Chittagong, dated the 1st April, 1912, affirming that of Babu Manmatha Nath Chowdhury, Officiating Additional Munsiff of Hathazari, dated the 31st January, 1911

(1) (1909) 11 C. L. J. 98.

(2) (1914) 22 C. L. J. 223.

The judgment of the Court was as follows :

This appeal arises out of a suit by the plaintiff appellant who is the purchaser of an entire estate under Act XI of 1859 to eject the defendants. The defendants and their predecessors in interest, it is found, had been holding the lands at any rate from 1838 as raiyats, and had acquired a right of occupancy in the lands in suit, but the defendant Chunnu Miah and another in 1881, executed a *Daimi Kaimi Chirasthai* (permanent) raiyati kabuliat. The Courts below have held that the interest of the defendants was protected under section 37 of Act XI of 1859, and the plaintiff was not therefore entitled to khas possession, but was entitled to fair and equitable rent for the lands. The plaintiff has appealed to this Court.

Under section 37 of Act XI of 1859, the purchasers at a revenue sale is not entitled to eject any raiyat *having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force*. On the facts stated, the defendants' interest *prima facie* is that of a "raiyyat having a right of occupancy at a fixed rent."

At the time when the Revenue Sale Law (Act XI of 1859) was passed, the law relating to landlord and tenant in force was Act X of 1859, and under section 6 of that Act every raiyat who cultivated or held land for 12 years acquired a right of occupancy in such land. Under that Act there were two classes of occupancy raiyats *viz.*, raiyats at *fixed rates of rent*, and occupancy raiyats who did not hold at fixed rates of rent (see sections 3, 4, 5 & 6). Both these classes of occupancy raiyats are protected under the proviso to section 37 of Act XI, which provides that the purchaser shall not be entitled to eject any raiyat having a right of occupancy at a fixed rent, or at a rent assessable according to fixed rules under the laws in force. "Occupancy raiyats at fixed rates of rent" do not find any place in the classification of "raiyyats" under the Bengal Tenancy Act. Under that Act there are occupancy raiyats, and raiyats holding at fixed rates. But if a raiyat had a right of occupancy at a fixed rent under Act X of 1859 (as the defendants in the present case had) we do not think that he lost his right of occupancy and the privileges attaching to it after the passing of the Bengal Tenancy Act, merely because occupancy raiyats holding at fixed rates of rent are not separately mentioned in the classification of raiyats under the Bengal Tenancy Act.

It is contended on behalf of the appellant on the authority of the case of *Bhul Nath Naskar v. Surendra Nath Dutt* (1), that a

(1) (1909) 13 C. W. N. 1025 ; 11 C. L. J. 98.

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raiyat at fixed rates cannot have a right of occupancy. The question which had to be considered in that case was, whether the interest of the defendant was a protected interest within the meaning of section 160 clause (d) of the Bengal Tenancy Act. Doss, J. held upon a construction of the lease in that case, that the interest of the defendants was a tenure, and that if the defendants were treated as raiyats holding at fixed rates, their interest was not protected under section 160 of the Act. On appeal under the Letters Patent, the learned Chief Justice affirmed the judgment of Doss, J. on the ground that the interest of the defendants was a tenure and therefore not protected under section 160, and did not express any opinion on the other question. Mookerjee, J. confirmed the judgment of Doss, J. not only on that ground, but also on the ground that a raiyat holding at fixed rates is not protected under section 160 of the Bengal Tenancy Act.

It is necessary to consider in the present case, whether a raiyat holding at fixed rates is protected under section 160 of the Bengal Tenancy Act, as the present case has to be considered with reference to section 37 of Act XI of 1859, the wording of which differs materially from that of section 160, cl (d) of the Bengal Tenancy Act. Reliance, however, is placed on behalf of the appellants on the observations of Mookerjee J. in that case, in support of the proposition that a raiyat holding at fixed rates, cannot have a right of occupancy. No doubt, the mere fact that a holding is held at fixed rates, does not make it an occupancy holding, for a raiyati holding at a fixed rent may be created only a month before the revenue sale, and the raiyat, in such a case, cannot certainly be called a raiyat having a right of occupancy. The defendants in the present case had acquired a right of occupancy before their rent was fixed in perpetuity, which again was before the passing of the Bengal Tenancy Act. It is unnecessary, therefore, to consider, in the present case, whether a raiyat holding at fixed rates after he has held the land for 12 years in a village can become a settled raiyat of the village and acquire a right of occupancy—a question upon which there is divergence of judicial opinion. (See the unreported cases, Second Appeal No 1115 of 1915 decided on the 15th February 1917 and Second Appeal No. 847 of 1913 decided on the 26th May 1915). The only question for consideration, is whether a raiyat who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy raiyat although his rent has been fixed in perpetuity by reason of which he becomes a raiyat holding at fixed rates according to the

classification of raiyats in the Bengal Tenancy Act. Section 19 provides that every raiyat who immediately before the commencement of the Act has a right of occupancy in any land shall, when the Act comes into force, have a right of occupancy in that land, and section 178 (1) cl. (b) of the Bengal Tenancy Act provides that nothing in any contract between a landlord and tenant made before or after the passing of the Act shall take away an occupancy right in existence at the date of the contract. In the present case the kabuliati executed in 1881 by which the rent of the defendants was fixed did not even purport to take away any right which the defendants had at the date of the kabuliati. The right of occupancy, therefore, which the defendants had, was not affected by the kabuliati by which the rent was fixed.

Mookerjee J. in referring to the omission of 'a raiyat holding at fixed rates' from section 160, suggests that "the policy of the Legislature was to protect the raiyat, but not necessarily to the complete detriment of the purchaser of a tenure at a sale for arrears of rent. If a raiyat holding at a fixed rate of rent were protected from ejection, the purchaser would acquire the property in an incumbered condition; for he would be unable, not only to eject the raiyat but also to enhance the rent. On the other hand, if occupancy raiyats and non-occupancy raiyats alone were protected from ejection, while their possession would be maintained, they would be liable to have their rent enhanced from time to time, at the instance and for the benefit of the purchaser of the tenure."

Those considerations, however, do not arise in connection with the proviso to section 37 of Act XI of 1859. That proviso expressly lays down that the purchaser shall not be entitled to enhance the rent of an occupancy raiyat otherwise than in the manner prescribed by law or otherwise than the former proprietor irrespectively of all engagements made since the time of settlement may have been entitled to do. Now the rent of an occupancy raiyat who holds at a fixed rate of rent from the time of the Permanent Settlement, could not be enhanced under Act X of 1859, nor can the rent of such a raiyat be enhanced under the Bengal Tenancy Act. Section 37 of Act XI of 1859 having expressly laid down that the purchaser at a revenue sale is not entitled to enhance the rent of such raiyats, no question arises as to the "detriment of the purchaser," under that section. Where, however, the occupancy raiyat holds at a fixed rent not from the time of the Permanent Settlement, but only under an engagement made since the time of settlement, he is not protected from enhancement, because the former proprietor would have been,

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irrespectively of the engagement, entitled in a proper case to raise the rent of such a raiyat. The purchaser, however, is not entitled to eject occupancy raiyats of either of the two classes. The rights of the purchaser as regards *enhancement* of rent, having been clearly laid down by section 37 of Act XI of 1859, the considerations relied upon by Mookerjee J. do not arise in connection with cases coming under section 37 of the Revenue Sale Law. The case of *Abdul Gani v. Makhbul Ali* (1) in so far as it holds that a person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right, and that such a person is protected from ejectment, under section 37 supports the view we take and to that extent we agree with that decision. If the opposite view were taken, raiyats who might be holding lands for generations and who might have acquired rights of occupancy, would be liable to be ejected by a purchaser at a revenue sale, simply because they may come under the description of raiyats holding at fixed rates under the Bengal Tenancy Act, by reason of their rent being fixed in perpetuity by contract, or by reason of their holding at the same rent from the time of the Permanent Settlement or by reason of a presumption arising under section 50 of the Bengal Tenancy Act that they have been so holding, when the clear intention of the Legislature is to protect such raiyats from ejectment at the hands of a purchaser at a revenue sale.

We are of opinion that as the defendants had acquired rights of occupancy they were protected from ejectment under the proviso to section 37 of Act XI of 1859 although they held at a fixed rent. The appeal is accordingly dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1914) 22 C. L. J. 223.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Beachcroft.*

SURENDRA NATH DEY AND OTHERS

v.

RAJENDRA CHANDRA CHANDRA AND OTHERS.*

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July, 30.

*Mortgage—Mortgage by ghatwal—Property inalienable but subsequently became
alienable.*

A mortgage by a ghatwal of a certain property which was subject to certain restrictions on his right of alienation at the time of execution but which were removed afterwards and before the institution of suit, though it operates as a conveyance, is operative as an executory agreement, which attaches to the property, the moment the restrictions are removed and in equity transfers the beneficial interest to the mortgagee without any act done by the mortgagor to confirm the mortgage.

Appeal by the Plaintiffs.

Suit to enforce a mortgage.

The material facts and arguments appear from the judgment.

Babu Mohini Mohan Chatterjee for the Appellants.

Dr. Dwarka Nath Mitter and *Babu Bejoy Kumar Bhattacharjee*
for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiffs in a suit to enforce a mortgage, dated the 1st September, 1901. Two questions are in controversy at this stage namely, first, is the second parcel subject to an enforceable charge; and, secondly, what is the amount still due to the plaintiffs.

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The property in question originally formed part of a ghatwali tenure. Before the mortgage was executed, an agreement had been made on the 5th August, 1901, between the Government, the zemindar and the ghatwal to the effect that on resumption the land would be settled with the ghatwal. On the same day, the ghatwal executed a mourasi mukarari kabulyat in favour of the zemindar, and, on the 17th December, 1901, the zemindar executed a mourasi mukarari pottah in favour of the ghatwal. The ghatwal, however, was not released from his police duties till the 17th June, 1902. Between the execution of the mortgage and the

* Appeal from Appellate Decree No. 501 of 1915, against the decision of C. Twidell, Esq., District Judge of Bankura, dated the 7th December, 1914, modifying that of Babu Dines Chandra Sen, Munsiff of Bishnupur, dated the 1st September, 1913.

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completion of the resumption proceedings, the ghatwal, on the 19th May, 1902, sold the second parcel to the predecessors-in-interest of the contending defendants, who, in their turn, on the 31st May, 1909, conveyed the property to the respondents. The position taken up by the contesting defendants is that on the date of the execution of the mortgage, the second parcel was still non-transferable ghatwali land, and, consequently, no valid charge was created therein. This view did not commend itself to the trial Court, and a mortgage decree was made in respect of the disputed parcel as also the other lands included in the security. On appeal, the District Judge, took a different view and held that there was no valid mortgage enforceable against this property. In our opinion, this conclusion cannot be supported.

It is not necessary for our present purpose to determine, whether ghatwali property is inalienable in the sense that if it is transferred by the ghatwal to stranger, the transferor himself is entitled to question the validity of the alienation; for whether ghatwali land is or is not inalienable in this sense, our ultimate decision must be in favour of the plaintiffs.

The position of the plaintiffs cannot be worse than that of a mortgagee of non-existent property. On the 1st September, 1901, the ghatwal was entitled to the land, subject to certain restrictions on his right of alienation. These fetters were removed, let us assume, on the 17th June, 1902. But in anticipation of such removal, he had executed a mortgage in favour of the plaintiffs. If not immediately operative, the mortgage would, in equity, be operative, at least as an agreement to grant a mortgage. The true position then is best described in the words of Westbury L. C. in *Holroyd v. Marshall* (1):

"It is quite true that a deed which professes to convey property, which is not in existence at the time, is as a conveyance void at law, simply because there is nothing to convey. So, in equity, a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser imme-

(1) (1862) 10 H. L. C. 191.

diately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree the specific performance. If it be so, then, immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract."

To the same effect are the observations of Jessel, M.R., in *Colleyer v. Isaacs* (1).

"A creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot, in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which should be done, fastens upon that property, and the contract to assign this becomes a completed assignment." See also *Tailby v. Official Receiver* (2).

These principles were applied in the case of *Khobhari Singh v. Ram Prosad Roy* (3), where the Court was called upon to decide the validity of a mortgage of property, purchased at a sale for arrears of revenue, the title wherein had not at the time of the execution of the mortgage, vested in the auction-purchaser. It was ruled that a mortgage of non-existent property, though inoperative as a conveyance is operative as an executory agreement, which attaches to the property, the moment it is acquired and in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage. The same doctrine had been previously applied in the cases of *Mackinlay v. Dunlop* (4), and *Baldeo Sahu v. N. B. Miller* (5). Reference may also be made to the decisions of the Allahabad High Court in *Bansidhar v. Sant Lal* (6), and *Gaya Din v. Kashi Gir* (7).

It is worthy of note that if this view were not adopted, the respondents would have to be left out of the suit as persons who had no interest in the mortgage property at the date of its institution. If the contention of the respondents is well-founded, on the 19th May,

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(1) (1811) 19 Ch. D. 342

(3) (1907) 7 C. L. J. 387.

(5) (1904) 1 L. R. 31 Cal. 667.

(7) (1906) 1 L. R. 29 All 163.

(2) (1888) 13 App. Cas. 523.

(4) (1850) 1 Taylor & Bell. 498.

(6) (1887) 1 L. R. 10 All. 133.

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1902, when the ghatwal transferred the disputed property to the predecessor-in-interest of the defendants, no title passed from the ghatwal. On the 23rd November, 1912, when this suit was instituted, the respondents had not acquired a title by adverse possession. The result would thus follow that the defendants were not proper parties to the suit. This position they are not prepared to accept; they maintain that as soon as the resumption was completed on the 12th June, 1902, the title vested in them by virtue of the conveyance of the 19th May, 1902. But precisely the same argument is available to the plaintiffs; and they urge that the moment the resumption was completed, on the 12th June, 1902, the mortgage of the 1st September, 1901, ripened into an unimpeachable transfer. In our opinion, there is no possible escape from the position that there is a valid charge on the second parcel enforceable at the instance of the plaintiffs.

We may add that as a last resort reliance was placed upon the decision in *Purna Cukaha v. Soudamini Baisnabi* (1). That case is clearly distinguishable. There the purchaser set up title by purchase at a sale in execution of a money-decree. His position accordingly was that he had purchased the right, title and interest of the judgment-debtor as it stood when the attachment was effected. If on that date the judgment-debtor had no valid interest, the execution purchaser acquired no title: *Prisanna Kumar v. Srikantha* (2).

In the view we take, it is clear that there is not only a charge on the property, but that the charge covers the original advance as also the money subsequently paid to save the property.

The result is that this appeal is allowed, the decree of the District Judgeset aside and that of the Court of first instance restored. This order will carry costs both here and in the lower appellate Court.

A. T. M.

Appeal allowed.

(1) S. A. No. 1884 of 1903. Unreported.

(2) (1912) I, L. R. 40 Calc. 173; 16 C. L. J. 202.

Before Mr Justice Fletcher and Mr. Justice Richardson.

LAKHI CHARAN SAHA AND OTHERS

v.

MOKAR ALI.*

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1917.

February, 15.

Revenue Sale Law (Act XI of 1859), Sec. 37, Proviso—'Protected interest'—Settled raiyat holding land in the same village.

A settled raiyat holding land which was sold for arrears of revenue, in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent, has a protected interest within the meaning of the proviso to section 37 of the Revenue Sale Law.

Appeal by the Plaintiffs.

Suit to recover khas possession of the disputed land.

The material facts appear from the judgment.

Babus Dharendra Lal Kastgir and Khitis Chandra Sen for the Appellants.

Moulvi Abdul Jawad for the Respondent.

The judgments of the Court were as follows:

Fletcher, J.—This is an appeal from a decision of the learned Officiating Additional Subordinate Judge of Chittagong, dated the 10th February, 1915, affirming the decision of the Munsiff of Hathazari. The suit was brought by the plaintiffs to recover khas possession of the land in dispute. The plaintiffs purchased a revenue paying estate which was sold for arrears of revenue under the provisions of Act XI of 1859. The question in this case is "Has the contesting defendant a protected interest within the meaning of the proviso to section 37 of the Act?" The facts found are these:—First of all, it has been found that the contesting defendant is a settled raiyat of the village within the meaning of the Bengal Tenancy Act. Secondly, it has been found that he holds the land in suit which is in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent. Whatever may be the law as regards other classes of raiyats, it is quite clear on the terms of section 21 of the Bengal Tenancy Act that, contract or no contract, every raiyat who is a settled raiyat of a village and obtains a raiyatee interest in other lands in that village acquires a right of occupancy in those other lands;

February, 15.

* Appeal from Appellate Decree No. 1115 of 1915, against the decree of Babu Tinkowri Chowdhury, Officiating Additional Subordinate Judge of Chittagong, dated the 10th February, 1915, affirming that of Babu Gopal Chunder Bose, Munsiff of Hathazari, dated the 23rd August, 1913.

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and, if that is so, the present defendant seems to me clearly to have a right of occupancy, in the land in dispute. If he has a right of occupancy, he comes clearly within the proviso to section 37 of Act XI of 1859, and has an interest which has not been annulled by the sale for arrears of revenue. In that view, I agree in the decision arrived at by the learned Judge of the lower appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

Richardson, J.—I agree.

A. T. M.

Appeal dismissed.

CIVIL RULE.

Before Sir Charles Chitty, Knight, Judge and Mr. Justice Beachcroft.

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July, 23, 24.

THE RIVER STEAM NAVIGATION COMPANY, LTD.,

AND ANOTHER

v

MESSRS. HAZARIMALL MULTAN MAL.*

Carriers Act (III of 1865, as amended by Act X of 1899), Sec. 10—Notice—Manner of service, if can be restricted by the contract—Loss of goods—Knowledge of the carrier, if sufficient—Civil Procedure Code (Act V of 1908), Sec. 115—Error of law—Revision.

A condition in a bill of lading requiring the service of notice of claim in respect of the contract at the carrier's office at a particular place, is not inconsistent with the provisions of section 10 of the Carriers Act, and is perfectly legal.

Notice under section 10 of the Carriers Act must be given, and it is not enough that the carrier had knowledge *alimunde* of the loss.

British and Foreign Marine Insurance Co., Ltd. v. India General Steam Navigation and Railway Co. Ltd. (1) followed.

High Court refused to interfere under section 115 of the Code of Civil Procedure although it was of opinion that the lower Court's decision was erroneous in law.

* Civil Rule No. 522 of 1917, against the decision of M. Ahmad Esq., Subordinate Judge of Assam Valley Districts, dated the 21st March, 1917, modifying the decision of J. N. Dass, Esq., Munsiff at Tejpur, dated the 16th August, 1916.

(1) (1910) I. L. R. 38 Calc. 50.

Amir Hassan v. Sheo Baksh (1) and *Shew Prosad v. Ram Chunder* (2)
referred to.

Application by the Defendants, The River Steam Navigation Company Ltd., and the India General Navigation and Railway Co., Ltd.

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Navigation Co. Ltd.
v.
Hazarimall.

Suit for recovery of money on account of loss of goods.

The material facts will appear sufficiently from the judgment.

Babu Manmatha Nath Mukherjee for the Petitioners.

Babus Mahendra Nath Ray and *Hemendra Kumar Das* for the
Opposite Party. □

C. A. V.

The judgment of the Court was as follows :

It is a Rule issued at the instance of the defendants calling upon the plaintiffs to show cause why the decree passed against them by the Munsiff of Tezpur and modified on appeal by the Subordinate Judge of Assam Valley Districts should not be set aside on the ground that condition No. 17 of the bill of lading requiring service of notice of claim at the defendant's office in Calcutta was perfectly legal, and that the Courts below had no jurisdiction to entertain the suit without strict compliance therewith being proved. The clause in question runs as follows :—"No claim of any kind whatsoever in respect of the contract shall be valid unless notice in writing shall be given and delivered at the office of the Company at Calcutta within six months from the date of any default, loss, or damage in respect of which such claim arises." The facts are that on 16th August, 1914, goods were shipped by the defendant Companies' steamer at Calcutta consigned to the plaintiffs at Bishwanath Ghat. There was short delivery, and on 21st September, 1914, a notice of claim was delivered to the defendant's sub-agent at Biswanath Ghat. He is described as joint agent, as he represented the two steamship companies.

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—

On 19th October, 13th November, and 10th December 1914, three more letters were delivered to him. On 27th January 1915, he wrote repudiating the claim. On 29th January 1915, the plaintiffs wrote to the defendants company's head office asking for a copy of the bill of lading which was supplied on 3rd February 1915. The plaintiffs then filed this suit.

The learned Sub-Judge held that the defendants had no power to restrict the manner of service of notice by limiting the service

(1) (1884) I. L. R. 11 Calc. 6.

(2) (1913) I. L. R. 41 Calc. 323.

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at the Calcutta office of the company. He thought that the notice served in this case on the sub-agent at Biswanath Ghat was a good notice in the circumstances of the case, especially as he found that the defendants companies came to know of the claim in less than six months time and had no difficulty in tracing the goods.

This decision of the learned Subordinate Judge appears to be erroneous. In the first place clause 17 does not in any way limit the requirements of section 10 of the Carriers Act, 1865. It is entirely consistent with that section. Secondly, it has been held by this Court in *British and Foreign Marine Insurance Co. Ltd. v. India General Steam Navigation and Railway Co., Ltd.* (1) that notice under section 10 of the Carriers Act must be given. It is not enough to say that the Company had knowledge *aliunde* of the loss.

But we are met with the objection that this is merely a decision erroneous in law that there is nothing in the procedure of the Courts below which warrants our interference under section 115 of the Civil Procedure Code. In the petition for the Rule the question of jurisdiction was ingeniously introduced, but it is really not a question of jurisdiction at all. The cases of *Amir Hassan Khan v. Sheo Baksh Singh* (2) and *Shu Prosad Bungshidhur v. Ram Chunder Haribux* (3), make this clear. We must therefore decline to interfere in revision. The Rule is discharged but in the circumstances without costs.

A. N. R. C.

Rule discharged.

(1) (1910) I. L. R. 38 Calc. 50.

(2) (1884) I. L. R. 11 Calc. 6.

(3) (1913) I. L. R. 41 Calc. 323.

PRIVY COUNCIL.

PRESENT: *Lord Parker of Waddington, Lord Wrenbury, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.*

AMRIT NARAYAN SINGH

v.

GAYA SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

Hindu Law—Nature of a reversioner's right—A guardian cannot deal with his ward's reversionary right.

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A Hindu reversioner has no right or interest *in presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

Appeal from a judgment and decree of the Calcutta High Court, dated 16th July, 1913, reversing a decree of the Subordinate Judge of Patna, dated the 20th January, 1909. One Jhamman Singh died leaving a widow Radha Koer, a daughter Kar Koer and Amrit Narayan, the daughter's son then a minor. The widow applied for mutation, but her application was opposed by the defendants who were collateral relations of the deceased. Radha Koer's name was registered but she died in 1863. Disputes as to succession again arose, and Kar Koer and her husband Rajender Singh, father and guardian of the minor Amrit Narayan Singh, on the one side and the defendants on the other executed an agreement to refer the matter to arbitration. But before the arbitrators could decide anything the parties entered into a compromise, which was placed before the arbitrators, and they were invited to make and in fact made an award in accordance with the compromise. Under the compromise the properties in suit were awarded to the defendants. On the death of Kar Koer in 1905^c the appellant Amrit Narayan brought the present suit to recover possession of those properties from the defendants. The Subordinate Judge found all the material issues in favour of the plaintiff and decreed the suit. He found that the plaintiff was not a party to the arbitration proceedings, that his father was not appointed a guardian under the provisions of Act XL of 1858, that the compromise and award were nullities and that the judgments of the District Judge and the High Court by which the said award was made a decree of Court were not binding on the appellant. The defendants appealed to the High Court which allowed the appeal and dismissed the suit.

De Guryther, K. C., and *B. Dube* for the Appellant: Jhamman Singh was admittedly separate and the appellant was therefore entitled to inherit his estate. The suit was well within time under article 141 of the Limitation Act, 1877. Article 95 of that Act does not apply. Plaintiff's claim was not barred by the proceedings in arbitration taken by his mother and father. There was really no arbitration. The award was based on the compromise which Kar Koer and Rajender Singh made. The appellant was not a party to the compromise and the same was made against his interest. The

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plaintiff did not possess any interest whatever in Jhamman Singh's estate during the lifetime of his mother. His right was merely *spes successionis*, and was not transferable. In any case the civil Courts dealt with the award, did not adjudicate upon the reversionary right of the plaintiff and the award was made a decree of Court against Kar Koer alone. Further section 3, Act XL of 1858 was intended for the protection of minors, but Rajender Singh was not appointed guardian of the minor. Reference was made to the following cases:

Sham Sunder Lal v. Akhan Kunwar (1); *Mussammat Bibi Walian v. Banke Behari Pershad Singh* (2); *Noggendro Chundro Mittro v. Kishen Soondory Dassee* (3).

A. M. Dunne, K. C. for the respondents: The plaintiff's mother represented the whole estate and the proceedings by which she sought to set aside the award were properly heard and decided and she failed. It was therefore a good judgment and was binding on the reversioners who succeeded the widow: *Katama Natchier v. Srimut Rajah Mootoo Vijaya* (4).

Further, the arbitrators decided the dispute by holding that the plaintiff and his mother had no interest according to the religious custom and usage of the parties. The minor was a party to the arbitration and the award was binding on him.

No reply was called upon.

Their Lordships' judgment was delivered by

November, 22.

Mr. Ameer Ali.—This is a suit by a Hindu reversioner to recover possession of certain properties that originally belonged to his maternal grandfather, Jhamman Singh. He alleges that the defendants, respondents before this Board, wrongfully possessed themselves of these properties under colour of certain arbitration proceedings whilst the estate was held by his mother, Kar Koer, as a female owner under the Hindu Law. Kar Koer died in 1905, and this action was brought in 1908. The suit is therefore clearly within time. The sole question for determination in this appeal is whether the arbitration proceedings and the decree on the award which gave to the predecessors of the respondents possession of these properties are binding on the appellant.

On Jhamman's death Radha Koer, his widow, applied for the registration of her name in place of her deceased husband in the

(1) (1898) L. R. 25 I. A. 183; I. L. R. 21 All. 71.

(2) (1903) L. R. 30 I. A. 182; I. L. R. 30 Calc. 1021.

(3) (1873) 19 W. R. 133 P. C.

(4) (1863) 9 M. I. A. 539 (604); 2 W. R. P. C. 31.

Collector's records. Her application was opposed by some of Jhamman's agnatic male relations, whom the respondents now represent; they claimed the property both under the general Hindu law as also under some undefined family custom. Their objections were overruled by the revenue Courts, and Radha Koer's name was duly entered in the Collector's register. Radha died shortly after in 1864, and was succeeded in the possession of the estate by her daughter, Kar Koer, the mother of the appellant. The agnates raised a fresh contest as to her right to hold the property. In the disputes that followed, and which were eventually referred to the arbitration of a number of caste men, she seems to have been represented by her husband, Rajander Singh. There is nothing, however, on the record to show if he had any authority to act for her as her agent. Before the arbitrators had taken any action in the matter, a compromise was arrived at, in which also Rajander purported to act both for her and her infant son, the appellant. Under this compromise, Kar Koer abandoned, in favour of the agnates, all right to the immovable property of her father, receiving on her part, besides some movable property, two small fractional shares in certain lands which stood in her and in her mother's names. The effect of the arrangement was to extinguish completely the reversionary interest of the appellant in his grandfather's estate.

The compromise was placed before the arbitrators and they were invited to make an award in accordance therewith, which they did. It is to be noted that there is nothing on the record to show that the proceedings before the arbitrators ever came to the knowledge of Kar Koer or that she knew of the compromise and its effect. In fact, it appears that Kar Koer did not acquiesce in the award, and the opposite party had to apply to the civil Court under the provisions of section 327 of Act X of 1859 (the law that regulated at the time the procedure of the civil Courts in India) for a decree on the award. The Court of first instance held that all the proceedings in connection with the compromise and the award had been without Kar Koer's knowledge. It accordingly dismissed the application of the agnates under section 327.

They appealed to the District Judge, who apparently considered that as Rajander, her husband, was a party to the compromise, her denial could not be believed. He accordingly made a decree "to have the award filed and enforced under section 327." From this decision Kar Koer preferred a "special appeal" to the High Court of Calcutta, which was dismissed. She then applied for a review of judgment, in which she was equally unsuccessful. The result of

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these decisions was to put her out of possession of the properties covered by the compromise, and which form the subject-matter of the present action. Although the respondents or their predecessors appear to have obtained possession of these properties after the proceedings in the High Court, which terminated in 1865, their names were not registered in the Collectorate in substitution of Radha Koer until 1877.

It is to be noticed that neither in the judgment of the District Judge nor in that of the High Court is there any reference to the right of Kar Koer's infant son or to the effect of the compromise which culminated in the award on his reversionary interest. Had the question been presented in any shape to the Courts that were dealing with the matter, it is hardly likely their judgments would not have contained some expression as to whether the compromise and the award based thereon were or were not for the benefit of the reversioner.

In this action the plaintiff charged that the arbitration proceedings, together with the compromise and award, were fraudulent and taken and entered into without the knowledge or authority of Kar Koer; that in any event he was not bound by them. The defendants, on the other hand, among other pleas urge that the award and decree precluded the plaintiff from maintaining the action. The Subordinate Judge of Patna, before whom the suit came for trial in the first instance, framed a number of issues on the several allegations of the parties, most of which have become immaterial in view of the shape the case took on appeal to the High Court. The trial Judge, in a well-reasoned and exhaustive judgment, held in substance that Jhamman at the time of his death was separated from his agnates; that the defendants had failed to prove the custom they alleged relating to the exclusion of widows and daughters; and that the plaintiff was not properly represented in the arbitration proceedings or in the proceedings before the civil Courts, and was not bound by the award or the decree based thereon. He accordingly decreed the plaintiff's claim.

From this decree the defendants appealed to the High Court of Calcutta, where the case proceeded on the assumption that Jhamman was separate from his agnates, and that assumption has not been challenged before this Board. The contest in the High Court turned solely on the binding effect of the award and the decree enforcing it on the rights of the infant reversioner.

The learned Judges state thus the questions they had to determine, *vis.*—

“(1.) Whether Rajander Singh had power to refer the matter on behalf of his minor son to arbitration ; (2) whether the plaintiff was properly represented in the proceedings in the Civil Court under section 327 of Act VIII of 1859 ; and (3) and if he was, whether he can now treat the decree, which was based on the award, as a nullity, and claim possession of these properties at this distance of time.”

After answering the first two questions in the affirmative, the learned Judges decided the third against the plaintiff, and reversing the decree of the Subordinate Judge, dismissed the plaintiff's suit.

Their Lordships are unable to concur in the propositions on which the learned Judges of the High Court have based their judgment. With respect, in proceeding to consider whether Rajander Singh, the plaintiff's father, had power to refer the matter on behalf of his minor son to arbitration, they seem to have misconceived the legal position of the infant under the Hindu law. Evidently they thought he had a right which could form the subject of bargain. This is an obvious mistake ; a Hindu reversioner has no right or interest *in presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise ; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. Rajander's action, therefore, in referring to arbitration any matter connected with his son's reversionary interest was null and void.

The learned Judges seem also to have lost sight of the fact that the award actually made was based on the compromise ; it gave effect to the agreement at which the parties had arrived. Even had the minor an existing right, the father would have no power to enter into an arrangement which wiped out all his interest without any consideration, for the little property that was left to Kar Koer was taken by her under the compromise, and not by virtue of her right to her father's estate. It is difficult to see how the learned Judges came to the conclusion that the compromise was to the benefit of the minor.

Apart from the question whether Rajander could represent his son under the proceedings under section 327 of Act VIII of 1859 without a certificate under section 3 of Act XL of 1858 on which their Lordships desire to express no opinion, it is abundantly clear that the civil Courts did not purport in any shape or character to deal with or adjudicate upon the reversionary right of the infant. The

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decree enforcing the award was based on the finding that Kar Koer had acquiesced by her husband in the reference to arbitration; and that she had similarly consented to the compromise, and was therefore bound by the award. Beyond that the order of the District Judge, which was affirmed by the High Court, did not go; it affected her interest, and her interest only.

It may be noted here that on the appeal to the High Court the minor was not a party.

In the present appeal it has been attempted on behalf of the respondents to sustain the decree of the High Court on the basis of the *dictum* of the Judicial Committee in the well-known *Shiva-gunga Case*,* where, dealing with the question under what circumstances a decree against the widow may bind the reversioners, the Board expressed itself thus:—"that unless it could be shown that there had not been a fair trial of the right in that suit, or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to Angamootoo. For assuming her to be entitled to the Zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

In the present case their Lordships think it enough to say that the proceedings culminating in the decree by which the plaintiff is sought to be bound are entirely devoid of the conditions on which and which alone a reversioner can be shut out from the assertion of his right, which comes to him altogether independently of the female owner.

Their Lordships are of opinion that the judgment and decree of the High Court should be reversed and the decree of the Subordinate Judge restored. And they will humbly advise His Majesty accordingly. The appellant will have his costs in the High Court and in this appeal.

Watkins & Hunter:—Solicitors for the Appellant.

Barrow, Rogers & Nevill:—Solicitors for the Respondent.

J. M. P.

Appeal allowed.

* *Katama Natchier v. Srimut Raja Mootoo Vijaya* (1868) 9 Moo. I. A. 539.

PRESENT:—*Lord Buckmaster, Sir John Edge, Sir Walter Phillimore,
Bart and Sir Lawrence Jenkins.*

• TARINI CHARAN SARKAR

v.

BISHUN CHAND AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

Revenue Sale—Bengal Land-Revenue Sales Act (XI of 1859), Secs. 31 and 53—Encumbrances—Sale proceeds—Purchase by the proprietor—Sale brought about by dishonest motives of the proprietor—Code of Civil Procedure (Act V of 1908), Secs. 107 and 151, order 41, rule 33—Power of the Court of appeal—Estoppel—Fraudulent behaviour, effect of.

The Bengal Land Revenue Sales Act, section 31 provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court, but the section nowhere transfers the charge from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section, and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in the hands of the Collector.

Where the property is bought by the recorded proprietor and the estate is acquired, under section 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale has merely provided money for payment of the Government claims, and the encumbrances are left entirely unaffected and could only be enforced against the property, and the rights to the sale proceeds of the recorded proprietor, who has purchased the property, are those under section 31, notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest.

In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the *benamidar* of the purchaser at the sale, and consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The Court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the Court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale proceeds:

Held, that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts that showed all the circumstances relating to the sale, the Court had abundant power under sections 107 and 151, and Order

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4, rule 73, of the Code of Civil Procedure, to vary, as it did, the decree in the prior mortgagee's suit: *Held, also*, that the fact that the puisne mortgagee did not attack the sale in the prior mortgagee's suit, did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suits, and obtaining consequential relief.

A man is not to be punished for fraudulent behaviour by making him suffer other penalties than those which are the direct consequence of his fraud.

Appeals from a judgment of the Calcutta High Court (Chitty and Teunon JJ.) dated the 25th April 1912, modifying one and affirming two decrees made by the Subordinate Judge of Arrah. The facts of the case sufficiently appear from their Lordships' judgment.

De Gruyther, K.C., and *J. M. Parikh*, for Tarini Charan Sarkar, Appellant, opened his three appeals: Bishun Chand was estopped from impeaching the revenue sale. He was a party to the suit brought by Sri Kishun but did not plead therein that Tarini Charan and not Sangam was the real owner of the property. Instead of insisting that all mortgages should be paid out of the mortgaged property Bishun Chand allowed a decree to be made against surplus sale proceeds only. He cannot say in one suit that the sale encumbrances are enforceable against the sale proceeds and in another against the estate. Reference was made to the Bengal Land-Revenue Sales Act, sections 31, 37 and 53, and the Transfer of Property Act, section 73.

Dunne, K.C., and *B. Dube*, for Bishun Chand, Respondent, were not called upon to argue Tarini's appeal but were asked to open Bishun Chand's appeal: Both Ramratan and Sri Kishun were entitled to be paid, out of the sale proceeds only, as they treated the revenue sale as valid in every way. Sri Kishun's decretal money was recoverable under the decree of the Subordinate Judge from sale proceeds only. The High Court had no jurisdiction to modify the decree and make the mortgaged property liable at the instance of counsel for Tarini who had not appealed. Under section 31 of Act XI of 1859 Sri Kishun was entitled to treat the revenue sale as valid and to recover his mortgage money from the revenue sale proceeds. Tarini fraudulently brought about the revenue sale and is not entitled to any equity. It is not open to the High Court to vary the decree under the Code of Civil Procedure except by an appeal for the purpose. Although the appeals were heard together the findings in one appeal could not be used to influence the judgment in another appeal.

De Gruyther, K. C., for Respondent in the appeal of Bishun Chand, submitted that the High Court had ample jurisdiction to make a

proper decree upon the facts proved before it. All the parties were before the Court. Reliance was placed on sections 107 and 151 and order 41, rule 33, of the Code of Civil Procedure, 1908. Reference was made to *Tricomdas v. Gopinath*, (1).

Dunne K. C., replied.

The judgment of their Lordships was delivered by

Lord Buckmaster—These four appeals have been consolidated by order of the Board, dated the 26th March, 1917, and have been brought on and heard together.

In three of them Tarini Charan Sarkar is the appellant and Babu Bishun Chand is one of the respondents, and in the fourth Babu Bishun Chand is the appellant and Tarini Charan Sarkar is a respondent.

All the appeals are against a judgment of the High Court of Calcutta dated the 25th April, 1912, and three decrees made by that Court consequent on the judgment.

The questions raised arise out of certain mortgage transactions affecting a Tahal Touzi No. 7062 and, though the facts and circumstances are complicated and involved, for the purpose of explaining the real issues that have to be decided they can be briefly summarised.

In the early part of 1904 the registered proprietors of the said Touzi were Ram Ratan Sarkar in respect of a 4-anna share, and Sangam Sarkar in respect of the remaining 12-anna share. The Touzi, however, was subject to certain mortgages, of which it is only necessary to mention the following: Zarpeshgi Thicca of the 15th July, 1889, in favour of Gajadhar Lal and Sri Kishun Lal to secure 11,506 rupees and interest at 9 per cent. per annum, a further mortgage in favour of the same mortgagees dated the 16th July, 1889, to secure 11,000 rupees and interest at the rate of 12 annas per cent. per month and a mortgage of the 10th February, 1896, in favour of the said Babu Bishun Chand to secure a loan of 5,999 rupees with compound interest at the rate of 24 per cent. per annum with half-yearly rests. In the year 1900 a 4-anna share of the estate was sold in execution of a mortgage decree and was bought on the 8th August, 1900, by Ram Ratan Sarkar, and on the 7th March, 1904, the said Touzi estate was purchased on a sale made in execution of a decree at the suit of another mortgagee by one Chatarbhuji Sahai in the name of one Mahanand Sahai, and he, on the 14th May, 1904, purported to sell the property to one Sangam Sarkar. Sangam Sarkar was, however, but a mere name, it has been found, and it

(1) (1916) L. R. 44 I. A. 65; 25 C. L. J. 279.

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cannot now be questioned that the real purchaser was the appellant Tarini Charan Sarkar, who thus became the owner of the property subject to the mortgages.

On the 2nd June, 1904, the first of the suits, out of which these appeals proceed, No. 39 of 1904, was instituted by Babu Bishun Chand seeking relief in respect of his mortgage of the 10th February, 1896, against the representative of the original mortgagor and other parties. It would seem impossible that any estate could bear for long the burden of a mortgage on which the debt was accumulating by a process of compound interest on the principal sum at the rate of 24 per cent. per annum; and it appears that the appellant Tarini Charan Sarkar, instead of adopting what might have then been the inconvenient process of redeeming the mortgage by payment, resorted to the device of causing the mortgaged property to be sold for arrears of Government revenue and himself becoming the purchaser. To secure this object he wilfully allowed the Government revenue to fall into arrear, and the property was in consequence sold by the Government on the 28th August, 1906, nominally as the property of Ram Ratan Sarkar, and Sangam Sarkar, the registered proprietors, and was purchased for 29,500 rupees by Tarini Charan Sarkar, the true owner. Had Tarini Sarkar been successful in concealing the fact of his ownership the result of this device would have been that the claim of all the mortgagees would have been thrown on to the balance left of the 29,500 rupees—after satisfying the Government debt; and he would have held the property free from the inconvenience of the many and heavy charges to which it was subjected. Directly after the sale—on the 22nd October, 1906, Sri Kishun Lal and others instituted proceedings (No. 258 of 1906) to obtain payment in respect of the mortgage of the 15th July, 1889, seeking to obtain payment out of the surplus proceeds of the money due under the mortgages, the amount of which was stated to be—at the date of the proceedings—15,983 rupees. To these proceedings Babu Bishun Chand was by an order dated the 17th January, 1907, added as a defendant. On the 2nd December, 1907, Bishun Chand instituted his second suit, No. 151 of 1907, alleging that the purchase of the estate on the 14th May, 1904, was really made by Sangam Sarkar, *benami* for Tarini Charan Sarkar, that the sale for arrears of Government revenue had been fraudulently effected by the said Tarini Charan Sarkar, and asking either that the sale should be set aside or that his mortgage of the 10th February, 1896, should still remain valid and operative against the estate. In the first suit, No. 39 of 1904, the usual mortgage decree was made on the 6th

January, 1905, but it was set aside on the 18th April, 1907, and another trial was ordered. This took place on the 30th June, 1909, when the usual mortgage relief was granted.

In the second suit by Sri Kishun Lal and others judgment was delivered on the 23rd December, 1907, and a decree made in favour of the plaintiffs directing that the money due on the mortgage with interest and costs should be paid out of the surplus proceeds of sale. At the date of this decree the sale itself had become a subject of attack, and consequently the further provision was introduced that, in the event of the sale being set aside, the mortgage monies, interest, and costs should be realised by sale of the mortgaged property if the sum were not paid within six months from the date of decree.

The said Tarini Charan Sarkar did not appeal against this decree, but Babu Bishun Chand did, and the appeal came on for hearing together with the appeal by Tarini Charan Sarkar in the two suits commenced by Bishun Chand and an appeal by Sangam Sarkar in the suit No. 153 of 1907.

On the 25th April, 1912, the High Court delivered judgment, dismissing all the appeals; but at the instance of counsel who appeared for Tarini Charan Sarkar they varied the decree of the Subordinate Judge, in the suit by Sri Kishun Lal, by setting aside the direction that his mortgage monies should be paid out of surplus monies of the revenue sale, and made in its place the ordinary decree against the property itself. It is this latter part of the decree that is challenged by the present appeal of Bishun Chand.

Before dealing, however, with his contention, it is desirable to dispose, in the first instance, of the appeals of Tarini Charan Sarkar. He stands in this position: He is held to have been the real owner of the estate Touzi 7062 at the date of the sale of the 28th January, 1906, and it is further established by the findings, both of the Subordinate Judge and of the High Court that he deliberately allowed the Government revenue to fall into arrear in order that the property might be sold, and that he succeeded in purchasing it himself at an under-value under circumstances which concealed his original ownership, and appeared to establish an independent sale to an independent third party, so that all the claims of the mortgagees, beyond the amount that would be satisfied by the surplus proceeds of sale, would be wholly defeated.

These grave and serious charges are therefore supported by the concurrent findings of both the Courts, and no grounds whatever can be shown for disturbing these decisions. Counsel for Tarini Charan Sarkar undoubtedly realised this difficulty, and refrained from attack-

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ing the substance of the judgment, but said that it was one which Bishnu Chand had no right to claim, because he was estopped by his own conduct from seeking any such relief.

This estoppel is said to be effected by his action as a defendant in the suit brought by Sri Kishun Lal and his co-mortgagees. This suit—it will be remembered was brought after the revenue sale and sought relief against the proceeds. In that suit the plaintiffs alleged that there had been intentional default in payment of the Government revenue, but they made no reference to the fact that Tarini Charan Sarkar was the real owner, a fact of which they were probably unaware, and which in any event was wholly immaterial to them, since the money in Court was sufficient to satisfy their claims. Bishun Chand was only made a party to this suit as an encumbrancer upon the property. He had no power of controlling the form in which the suit was brought, nor was there any step which he took in the suit irrevocably asserting his intention to rely upon the sale and not impeach the whole proceedings. In these circumstances, it is obvious that no estoppel arises as against him, and as this is the only ground upon which the appeal of Tarini Charan Sarkar is or can be based, it follows that it must fail.

There remains the question of Bishun Chand's appeal, and the question to which that gives rise is one of more general importance. On his behalf it is alleged that Sri Kishun Lal and his co-mortgagees are entitled to be satisfied out of the proceeds of sale, and that, if these are sufficient for the complete satisfaction of their mortgages, their encumbrances are removed from the property, with the result that there is a more abundant security for Bishun Chand's claim; that, in fact, the proceeds of the first sale to the extent of Sri Kishun Lal's claim, are to be added to the proceeds of the sale made under the decree of the High Court, so as to make one fund out of which the mortgage debts may be satisfied.

In order to examine the value of this contention, it is necessary to look at "The Land Revenue Sales Act," No. XI of 1859, by which the rights of the parties are regulated. Section 31 of that statute provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court.

It is to be observed that this section nowhere transfers the charges from the property to the proceeds; but, as the sale by the Government conveys a title free from encumbrances to the purchaser,

the mortgagees are clearly entitled to claim the same as creditors under the section referred to, and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in Court.

It was a decree under this section that was obtained by Sri Kishun Lal, and it of course proceeded upon the assumption that the sale had been made to a *bona fide* third party. Section 53 regulates what happens when the property is bought by the recorded proprietor, and in that case it is enacted that the estate is acquired subject to all its encumbrances existing at the time of the sale. In such a case, therefore, the encumbrances are left entirely unaffected; the transaction of sale has merely provided money for payment of the Government claims, and the estate remains as it was before. Were such a purchase honestly and openly made, it was not disputed that the claims against the purchase money could not remain in addition to the claim against the estate. The appellant, however, says that in the present case the owner cannot claim this method of administration. He asserts that as it was by the fraud of Tarini Sarkar that the whole transaction was set on foot he is in a worse position than if he had become the purchaser on a sale made against his will.

Their Lordships are certainly not prepared to assist in providing any possible benefit for a course of conduct so dishonest as that revealed in this case but, on the other hand, it is not right to punish a man for fraudulent behaviour by making him suffer other penalties than those which are the direct consequence of his fraud. In the present case it is impossible to see how the position has been aggravated by the fact that the sale was effected for the purpose of defeating the mortgagees. The Act distinctly contemplates the purchase of property by a recorded proprietor, and the rights that arise in such a case are those which have been already mentioned. Their Lordships are unable to see why those rights should be increased against the purchaser because of the motives which led him to cause the sale or the purchase. The only effect of the statute is that, so far as the encumbrances are concerned, the sale is of no effect.

It is then urged that the Court of appeal had no power to vary the order made in Sri Kishun Lal's suit, since he did not request such variation, nor were the facts relating to the sale proved and established in any suit to which he was a party.

Their Lordships think it would have been a matter for regret if the Court of appeal had been thus hampered in making the order, which their Lordships regard as right in all the circumstances of the case. But they think abundant power is given to the Court by

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sections 107 and 151 of the Code of Civil Procedure of 1908 and order 41, rule 33 of the same statute. Section 107 gives power, if necessary, to take additional evidence ; and rule 33 of order 41 gives power to pass any decree and give any orders which ought to have been passed or made, and to pass or make such further or other decrees or orders as the case may require.

On hearing the appeal in Sri Kishun Lal's suit, the Court had before it the facts that showed all the circumstances relating to the sale. Sri Kishun Lal seems to have raised no objection to the variation of the order, and does not appear here on appeal against it. It is Bishun Chand, in whose suit all the facts were established, who seeks, on the one hand, to retain a judgment based upon the view that the sale was regular, and, on the other, to get the benefit of the decree which determined that it was not. There is certainly nothing in the statute which gives him such rights, and there is no equity to which he can appeal which entitles him to their possession. This appeal must therefore also fail.

It may be doubted whether in the end any property will be left for the real owner. Bishun Chand's mortgage runs at 24 per cent. compound interest with half yearly rests. It began at 5,000 rupees, and in the hearing before the Court it amounted to 40,000; and the long delay, amounting to five years, that has elapsed in prosecuting this appeal has more than doubled the amount. Usury and the abuse of legal procedure are a formidable and dangerous combination to the well-being of any community. The former is one which it is not easy to repress, but the latter ought not to be incapable of remedy. There seems to be no lack of expedition in the Courts in disposing of cases when once entered for hearing. The delay is associated with dilatoriness in procedure and apparent unwillingness on the part of persons who have the control of litigation to bring it to a speedy conclusion.

Eleven years have elapsed since Bishun Chand first instituted the proceedings in respect of his mortgage, and more time must pass by before the accounts are finally worked out and his claim ends ; and having regard to the rate at which his debt accumulates, in a short time the amount might reach the total wealth of the entire province.

All the appeals, therefore, fail, and in all the circumstances their Lordships think there should be no costs on either side. They will humbly advise His Majesty to this effect.

E. Dalgado :—Solicitor for Tarini Charan Sarkar.

Barrow, Rogers & Nevill :—Solicitors for Bishun Chand.

J. M. P.

Appeals dismissed.

CRIMINAL REFERENCE.

*Before Sir Charles Chitty, Knight, Judge and Mr. Justice Smither.**

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Charges, misjoinder of—Criminal misappropriation—Additional charge—Act forming one transaction.

The accused was a manager appointed by a District Judge of an idol and was as such manager, entrusted with the funds belonging to the idol. He was charged with misappropriations of portions of these funds under section 409 of the Indian Penal Code. The first item was one of Rs. 1441-9-3 said to be costs of the High Court decree in Regular Appeal No. 290 of 1909, to which the idol was a party. The second item was of a sum of Rs. 135 said to have been improperly retained by the accused on the 23rd July, 1915. The third was one of Rs. 5-12-3 also misappropriated by the accused as such manager between 14th December 1915 and 8th January 1916. Subsequently a charge under section 210 of the Indian Penal Code was added to the effect that on or about 10th December, 1914, the accused fraudulently obtained an order from the District Judge for the payment to himself of a sum of Rs. 1841-9-3 which sum was not due to him or which was larger than was due to him from the estate of the idol. This offence had some relation to one of the three charges of criminal misappropriation but not to the other two; and, in part, it referred to matters not included in any of those three charges as the accused was said to have committed criminal misappropriation of a further sum of Rs. 200 out of the Rs. 1841-9-3 :

Held, that the accused could not be legally tried on the fourth charge along with the three charges of criminal misappropriation, as it was not an act forming one transaction with them. A retrial of the accused was directed.

Criminal Reference under section 307 of the Code of Criminal Procedure.

The accused was appointed manager of the temple known as Guptipara Mutt of which the presiding deity is Brindaban Chandra Thakur, by the District Judge of Hooghly, under the provisions of section 5 of the Religious Endowments Act in July 1901. The idol owns and possesses considerable property, movable and immovable, all of which came into the possession of the accused as manager so appointed, and he continued to be in possession thereof till sometime in March 1910, when one Jogananda Asram, a former *Dandi* (shebait) of the Mutt took possession of the estate, under a decree of the Nadia Subordinate Judge's Court obtained by him against the accused. The accused preferred an appeal against that decree, being

* Criminal Reference No. 46 of 1917 by K. N. Chondhury Esq., Additional Sessions Judge of Hooghly.]

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Appeal No. 290 of 1909, in the Hon'ble High Court. That was in May, 1909. The appeal was decreed in favour of the accused, and he came again to be in possession of the estate in October, 1912, first as receiver appointed by the Nadia Sub-Judge's Court, and then as a manager from the 14th March, 1916, and continued to be in possession thereof till the 8th January, 1916, that is, the date on which he made over charge of his office to the present manager, who was appointed manager in his place by order of the District Judge of Hooghly under the provisions of the same Act.

There was a representation made to the District Judge of Hooghly by some members of the Guptipara public interested in the Mutt, complaining of mismanagement, malfeasance and misfeasance on the part of the accused. The District Judge at first directed N to hold an enquiry into this complaint, who reported against the accused. As the result thereof the accused was placed under suspension by the District Judge and R the present manager was appointed to be manager in his place and was directed also to examine the accounts of the accused and submit a report. The latter submitted a report to the District Judge, noting as the result of his examination of the accounts, various cases of defalcation by the accused of the temple money. The accused was thereupon called upon to show cause why he should not be criminally prosecuted. He showed cause and at the same time prayed for a fresh examination of his accounts and for testing of the correctness of the report of R by a local pleader named by himself. The District Judge allowed his prayer. The pleader held the enquiry as directed and submitted a report confirming the report of R. That led to the removal of the accused from the managership of the Mutt and to the institution of the present case.

The charges under section 409 of the Indian Penal Code were in respect of three sums of money, which the accused was said to have embezzled in his capacity as manager. Subsequently a charge under section 210 of the Indian Penal Code was added which was that the accused obtained from the District Judge of Hooghly fraudulently order for the payment to himself of a sum of Rs. 1841-9-3, which was not due to him, from the Mutt funds. The sum of Rs. 1441-9-3 which formed the subject matter of the first charge under section 409, Indian Penal Code, formed part of the above sum of Rs. 1841-9-3. There were also charges of embezzlement against the accused in respect of other items of money also.

The accused was tried in the Court of Sessions. At the trial the jury disagreed, a majority of three being in favour of an acquittal.

Disagreeing with that majority and thinking their verdict to be perverse, the Additional Sessions Judge referred the matter to the High Court.

Babus Manmathanath Mukherjee, Narendra Kumar Bose and Jatindra Nath Sen for the Accused.

Mr. Orr for the Crown.

The judgment of the Court was delivered by

Chitty, J.—This case comes before us on a reference by the Additional Sessions Judge of Hooghly under section 307, Criminal Procedure Code. On 23rd July, 1917, the accused Rajendra Roy was committed for trial in the Court of Session on three charges of criminal misappropriation committed on different dates in the year 1915. In the Sessions Court on 1st October, 1917, an additional charge was added of an offence under section 210, Indian Penal Code, in respect of a sum which was connected with the first of the three charges of criminal misappropriation. At the trial the Jury disagreed, a majority of three being in favour of an acquittal. Disagreeing with that majority and thinking their verdict to be perverse, the Additional Sessions Judge has referred the matter to this Court. On reading the letter of reference it appears to us that there was in this case a misjoinder of charges. In that view, it is unnecessary to go into the merits of the case as the only fair course will be to direct a retrial of the accused on charges properly framed and properly joined. The three charges of criminal misappropriation related to three separate sums. The accused was the manager appointed by the District Judge of Hooghly of an idol, Brindaban Chandra Thakur, of Guptipara; and, as such manager entrusted with the funds belonging to the idol. It is of portions of these funds that the alleged misappropriations took place. The first item was one of Rs. 1,441-9-3 pies said to be costs of the High Court decree in Regular Appeal No. 290 of 1909, to which the idol was a party. The second item was of a sum of Rs. 135 said to have been improperly retained by the accused on 23rd July, 1915. The third was one of Rs. 5-12-3 pies also misappropriated by the accused as such manager between 14th December, 1915 and 8th January, 1916. These three charges could, no doubt, have been properly tried together in one trial. The added charge was that the accused, on or about 10th December, 1914, fraudulently obtained an order from the District Judge of Hooghly for a sum of Rs. 1,841-9-3 pies which sum was not due to him or which was larger than was due to him from the estate of the idol. The date of this offence, it will be seen,

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was not within the year within which the three alleged offences of criminal misappropriation fell. We are of opinion that the accused could not legally be tried on this fourth charge along with the three charges of criminal misappropriation. It was not an act forming one transaction with them. It had some relation to one of the three charges of criminal misappropriation but not to the other two; and, in part, it referred to matters not included in any of those three charges because it appears from the letter of reference that the accused was said to have committed criminal misappropriation of a further sum of Rs. 200 out of the Rs. 1,841-9-3 pies. These being so, we think that the case must go back to the Court of Session for a re-trial of the accused. We need not here specify exactly on what charges he should be tried. That will be for the prosecution to consider and the Court to decide. We need only say that they must be charges which can be properly dealt with in one trial. The accused will remain on the bail at present subsisting.

A. T. M.

Retrial ordered.

CRIMINAL REVISION.

*Before Mr. Justice Teunon and Sir Syed Shamsul Huda,
Knight, Judge.*

CRIMINAL.

1917.

July, 13.

RAKHAL MANDAL AND OTHERS

v.

THE KING-EMPEROR.*

*Criminal Procedure Code (Act V of 1898), Sec. 107 (2), proceedings under—
Proceedings initiated by the District Magistrate—Person informed against,
not residing within the local limits of his jurisdiction—District Magistrate,
if can transfer such proceedings to a Subordinate Magistrate.*

Proceedings initiated by the District Magistrate under the special powers conferred upon him by section 107 (2) of the Code of Criminal Procedure can be transferred by him for disposal to the Court of some subordinate Magistrate otherwise competent to deal with the matter: *Surjya Kanta Roy Chowdhry v. Emperor* (1) followed. *Nirbeekar Chandra Mukerjee v. The Emperor* (2) not followed.

Criminal Revision.

* Criminal Revision No. 732 of 1917, (analogous to No. 772 of 1917).

(1) (1904) L. L. R. 31 Calc. 350.

(2) (1909) 13 C. W. N. 580.

The case arose out of a dispute about the collection of rents in Lot Pabra within the District of Bankura, between the petitioners Kalipada Roy and his brothers on the one hand, and their step-brothers Jugal and another on the other. Proceedings under section 107 (2) of the Code of Criminal Procedure were initiated against the petitioners by the District Magistrate of Bankura, as some of them were living outside the district, and the said proceedings were then transferred to the Sadar Sub-divisional Magistrate for disposal, who on the 26th March, 1917, directed under section 118, Criminal Procedure Code, that each of the petitioners would execute a bond for Rs. 100 with one surety for the like amount to keep peace for one year each, or in default undergo simple imprisonment for that period. An application for revision of the said order was rejected by the District Magistrate of Bankura, on the 24th April, 1917, under section 125, Criminal Procedure Code.

Against that order the petitioners moved the High Court, and obtained the Rule.

Babus Dasarathi Sanyal and *Kalikinkar Chakrabutty* for the Petitioners.

Babu Surendra Nath Ghosal for the Opposite Party.

The judgment of the Court was as follows :

In these two Rules the only question involved is, whether proceedings initiated by the District Magistrate under the special powers conferred upon him by section 107 (2), Criminal Procedure Code, must be continued to the end in his Court or whether they may be transferred by him to the Court of some subordinate Magistrate otherwise competent to deal with the matter. This question does not now come before this Court for the first time. In the case of *Surjya Kanta Roy Chowdhry v. Emperor* (1), the question was argued at the bar and discussed at length, and the learned Judges who heard that case took the view that it was sufficient that the District Magistrate should initiate the proceedings. In taking that view they further relied upon the case decided in the High Court of Allahabad in *King-Emperor v. Munna* (2). In a subsequent case in this Court in 1909 a Divisional Bench took the contrary view. But from the report of that case *Nirbeekar Chandra Mukerjee v. The Emperor* (3), it is clear that that was a case not argued at the bar and that consequently the prior decision of this Court in *Surjya v. Emperor* (1), was not brought

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(1) (1904) I. L. R. 31 Calc. 350.

(2) (1901) I. L. R. 24 All. 151.

(3) (1909) 13 C. W. N. 580.

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to the attention of the learned Judges. Under these circumstances we think that we ought to follow the earlier case (1) reported in 31 Calcutta and decided in this Court in 1904.

For these reasons we discharge these Rules.

A. N. R. C.

Rules discharged.

(1) (1904) I. L. R. 31 Calc. 350.

Before Sir Charles Chitty, Knight, Judge, and Mr. Justice Richardson.

CRIMINAL.

1917.

August, 3, 1917.

CHANDI CHARAN GIRI AND ANOTHER

v.

GADADHAR PRADHAN AND ANOTHER*.

Criminal Procedure Code (Act V of 1898), Secs. 195 cl. 16, 17—Bengal Tenancy Act (VIII of 1885), Sec. 69, appraisement proceedings under—Sanction to prosecute—Collector's Court, if subordinate to the Court of the District Judge for the purposes of section 195.

Proceedings under sections 69 and 70 of the Bengal Tenancy Act are clearly of a civil nature; and any sanction to prosecute given or refused in such proceedings by the Collector may be revoked or granted by the District Judge, as the Collector's Court must be regarded in such cases as subordinate to the principal Court of original civil jurisdiction, that is, to the Court of the District Judge, for the purposes of section 195 of the Criminal Procedure Code.

Ajudhia Prasad v. Ram Lal (1) referred to.

Criminal Revision.

The petitioners prayed that the order of the Sub-divisional Magistrate of Contai sanctioning the prosecution of them under sections 471 and 209 of the Indian Penal Code (or any other section) for filing or using as genuine certain rent receipts in the course of a proceeding under section 69 of the Bengal Tenancy Act, an application for the revocation of which order was dismissed by the District and Sessions Judge of Midnapore, might be set aside.

The other material facts will appear sufficiently from the judgment of Chitty J.

*Criminal Revision case No. 707 of 1917, against an order of W. N. Delevingne Esq., Sessions Judge of Midnapore, dated the 24th March, 1917, rejecting an application for revocation of sanction to prosecute granted by Babu Nikhil Nath Roy, Sub-divisional officer, Contai, on the 3rd of January, 1917.

(1) (1911) I. L. R. 34 All. 197.

Babus Jyotish Chandra Hazra and Santosh Kumar Pal for the Petitioners.

Babu Jogendra Narain Mazumdar (for *Babu Siroda Charan Muity*) for the Opposite party.

C. A. V.

The following judgments were delivered :

Chitty, J.—In this case the petitioners Chandi Charan Giri and Gojendra Barik applied to the Sub-divisional officer of Contai, exercising the powers of a Collector, for appraisement of produce under section 69 of the Bengal Tenancy Act. In those proceedings the officer deputed to hold a local enquiry reported that the petitioners had made use of forged receipts. On this report the Sub-divisional officer refused their application, and at the instance of their opponents granted sanction for their prosecution under sections 471 and 209, Indian Penal Code. From that order the petitioners appealed to the Commissioner of the Burdwan division. The Commissioner held that he had no jurisdiction and that the Court to which the Sub-divisional officer's Court was subordinate was that of the District Judge of Midnapur under section 195 (7) (c) of the Criminal Procedure Code. The petitioners then applied to the District Judge, but he too threw out their application on the ground that he had no jurisdiction to entertain it. He was of opinion that the Commissioner's Court had jurisdiction, as the Court to which appeals from the decisions of a Collector, or officer exercising the powers of a Collector, under the Bengal Tenancy Act would ordinarily lie. Against the District Judge's order the petitioners applied to this Court to exercise its revisional powers, and this Rule was issued. It should be noted that in proceedings under section 69 of the Bengal Tenancy Act by section 70 (5) "the Collector may, if he thinks fit refer any question in dispute between the parties for the decision of a civil Court, but subject as aforesaid his order shall be final, and shall on application to a civil Court by the landlord or the tenant be enforceable as a decree." There is consequently no appeal from an order of the Collector under section 70.

The Collector acting under sections 69 and 70 is a "Court," within the meaning of section 195, Criminal Procedure Code. (See *Raghoobun Sahoy v. Kokil Singh* (1). The question is to what authority he is to be regarded as subordinate for the purposes of section 195 (6). Section 195 (7) purports to supply the answer, but it is so unfortunately worded as to leave the enquirer in much the same doubt and uncertainty as he was before. The difficulty of

(1) (1890) L. L. R. 17 Cal. 872.

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interpretation will be apparent if clauses (a) and (b) be omitted. Section 195 (7) will then read:—"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say, (c) where no appeal lies such Court shall be deemed to be subordinate to the principal Court of Original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate." The difficulty seems to have arisen from the attempt to provide in one clause for cases where an appeal lies as well as for those where no appeal lies.

No doubt the words "where no appeal lies" are wide enough to cover cases, where all decisions of a particular Court are made final by law, e.g., a Small Cause Court, and also cases where a particular order is non-appealable, e.g., the case before us. I am inclined to think that the former class of cases only was referred to by the Legislature in this section 195 (7). If it were not so, the word "ordinarily" in the earlier part of the sub-section would be meaningless. Further there does not seem to be any good reason for possibly transferring jurisdiction from a Court of one class to a Court of another, simply because an appeal from the particular order in question is forbidden. Nor am I prepared to say that the principal Court of original jurisdiction must necessarily refer to a Court of any particular class. It is a civil or criminal or revenue Court, as the case may be.

In this particular case however I think that the difficulty may be surmounted. I cannot agree with the learned District Judge when he says that appeals from the decisions of the Collector under the Bengal Tenancy Act *ordinarily* lie to the Commissioner of the Division. A perusal of the Act will show that while in some cases an appeal is allowed to the Commissioner, e.g., section 40 (5), in other cases an appeal lies to the Special Judge, i.e., to a civil Court. If that be so, then under section 195 (7) (b) the nature of the case has to be considered. Proceedings under sections 69 and 70 are clearly of a civil nature. The Collector may state a case for the decision of a civil Court, and his order may be enforced as a decree of a civil Court. The Collector's Court may therefore be deemed to be subordinate to the civil Court, i.e., the Court of the District Judge, for the purposes of section 195. This is on the assumption that the words "where no appeal lies" refer only to the case where *all* decisions of a particular Court are not appealable.

If they also refer to a case like the present, where a particular order is not appealable, we arrive at the same result. In that view,

it being a matter of a civil nature, the Collector's Court must be regarded as subordinate to the principal Court of original civil jurisdiction, that is, to the Court of the District Judge.

The matter is by no means free from doubt, but this is the conclusion to which I have come after giving the matter my best consideration. I would accordingly make the Rule absolute, set aside the order of the District Judge, and remand the application of the petitioners to his Court to be disposed of on the merits.

Richardson, J.—The opening words of clause (7) of section 195 were apparently intended as a general definition or explanation of the term 'subordinate' as applied in the previous clauses to a Court.

The sub-clauses of clause (7) were meant, I think, to indicate the result of applying the opening words of the clause to the particular cases dealt with in the sub-clauses. The words "that is to say" at the end of the opening paragraph refer to the preceding words as a whole, with the sense "which means" or "the result being." The language is not very happy but that seems to me to be its effect.

This Court has held in *Raghoobuns v. Kokil* (1), that a Collector acting in appraisal proceedings under sections 69 and 70 of the Bengal Tenancy Act is a 'Court' within the meaning of section 195 of the Criminal Procedure Code. Reference may also be made to *Abdullah v. Emperor* (2).

Under clause (5) of section 70 of the Bengal Tenancy Act, the Collector's order is final. There is therefore no appeal and the case would seem to fall within clause (7) sub-clause (c) of section 195. The words "where no appeal lies" in that sub-clause are wide enough to include both a particular case or class of cases in which no appeal lies and a Court from which no appeal lies in any case, such as a Small Cause Court : *Nibaran v. Akshoy* (3).

As to the expression "principal Court of original jurisdiction," in sub-clause (c) it has been held in *Ajudhia v. Ram Lal* (4) that it means the principal Court of civil, criminal or revenue jurisdiction according to the nature of the case in which the question of sanction arises. I am not aware of any express decision on the point in this Court and I am not sure that it has not been generally assumed in this province that under the clause as it stands, "the principal Court of Original jurisdiction" is in a district the Court of the District Judge who is also in the great majority of cases

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(1) (1890) I. L. R. 17 Calc. 872.

(2) (1909) I. L. R. 37 Calc. 52.

(3) (1917) 21 C. W. N. 948.

(4) (1911) I. L. R. 34 All. 197.

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the Sessions Judge. However that may be, it is unnecessary in the present case to carry the discussion further. I agree that proceedings before the Collector under sections 69 and 70 of the Bengal Tenancy Act are in their nature civil proceedings and I concur in the order proposed by my learned brother.

A. N. R. C.

Rule made absolute: Case remanded.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir John Woodroffe, Knight, Judge.

SATINDRA MOHAN TAGORE

v.

SARALA SUNDARI DEBI AND ANOTHER.*

CIVIL.

1917

April, 30.

Caveat—Immediate reversioner not contesting—Next reversioner, if can enter caveat, and contest the suit.

A died testate leaving *B* his widow. Caveats were entered by the immediate reversioner *C* and by the mother of the widow of the testator, as well as by *D* and *E* who would be reversioners if *C* were to die before the widow. *B* by settling with the executor made it impossible for him successfully to challenge the will:

Held, that *D* and *E* had sufficient interest to entitle them to enter caveat and contest the suit.

Appeal by the Caveators *D* and *E*.

The material facts appear from the judgment of

January, 25.

Chitty, J.—This is an application on notice by the plaintiff in a testamentary suit that the caveat filed on 20th December 1915 by Satindra Mohun Tagore and Ronendra Mohan Tagore be discharged. It appears that in this case when the present plaintiff put forward the will of Atanunandan Tagore caveats were filed by Diptendra Mohun Tagore, Bidyut Prokash Ganguly and Srimati Hazari Dassi Devi. The case was accordingly set down as a

* Appeal from Original Civil No. 13 of 1917, against the judgment of Mr. Justice Chitty in Testamentary Suit No. 9 of 1915, dated the 25th January, 1917.

contentious cause by an order of 30th June 1915. The present caveators Satindra Mohun Tagore and Ronendra Mohun Tagore had also filed caveats, they being distant agnates of the deceased. It was pointed out at that time that they had no *locus standi* to come in and contest the will, and eventually in June 1915 their caveats were withdrawn. They have now filed them again and wish again to come in and contest the suit. It is conceded that though Diptendra Mohun Tagore, one of the other caveators, is dead the two caveators who came in with him, Bidyut Prokash Ganguly and Srimati Hazari Dassi Debi, are still on the record. It is alleged by Satindra Mohan Tagore and Ronendra Mohun Tagore that Bidyut Prokash Ganguly is contemplating a settlement of the case with the propounders of the will. It is not suggested that Hazari Dassi Debi, who is the mother of the widow of the deceased, has entered into or proposes to enter into any such compromise. It appears to me that for two reasons the caveats of these two persons should be discharged. In the first place they deliberately withdrew them in June 1915, and I do not think that the defendants in a suit ought to be allowed to blow hot and cold in that way, and, having withdrawn their defence, be allowed to come in again after a year and a half without some very good and substantial reason. The other reason is that the position of these parties, so far as the relationship is concerned, is in no way altered from the position in which they stood in June, 1915. It is conceded that the death of Diptendra Mohun Tagore has made no difference in that respect. It is clear therefore, that they have now no better *locus standi* than they had before. I accordingly make an order in terms of the petition that the caveats of these two persons be discharged with costs. Bidyut Prokash Ganguly must bear his own costs. Certified for counsel.

Against this order, the caveators appealed.

Mr. N. Sarkar for the Appellants.

Mr. S. R. Das for the Respondents.

The judgments of the Court were as follows :

Sanderson, C. J.—In this case the appeal is from the judgment of my learned brother Mr. Justice Chitty which was given upon an application by the plaintiffs in a testamentary suit that a certain caveat which was filed on the 20th of December 1916 by Satindra Mohan Tagore and Ronendra Mohan Tagore should be discharged. The will which was the subject matter of the suit was the will of one Atanunandan Tagore who died, as we are informed, at the age of 19 years, and left a widow who was then 13 years old

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and who at the time of the suit was said to be 16 years old. Caveats had been entered against the will by three persons Diptendra Mohan Tagore, Bidyut Prokash Ganguly and Srimati Hazari Dassi Devi. Of these Diptendra Mohan Tagore is now dead; Bidyut Prokash Ganguly is alive; and so is Srimati Hazari Dassi Devi who is the mother of the widow of the testator Atanunandan. Caveats had also been entered by the two appellants Satindra Mohan Tagore and Ronendra Mohan Tagore. But on the 17th of November 1914, a letter had been written by the solicitor for the plaintiffs alleging, on behalf of his clients namely, the widow of the deceased testator and the executor and the executrix named in the will, that the appellants had not any interest whatsoever, and that consequently the solicitor was instructed not to allow inspection of the will for which the appellants had been asking. The result of that, and, I think, of further communications was that on the 8th of March 1915, the caveats which had been entered by Satindra Mohan Tagore and Ronendra Mohan Tagore were withdrawn.

Now, the position at that time was as follows: Bidyut Prokash Ganguly was contesting the validity of the will as is shown by the fact that on the 11th of March 1915, he affirmed an affidavit in which he set up very serious allegations: In paragraph 9 of his affidavit he alleged that the brother-in-law of Srimati Sarola Sundari Debi who was the executrix of the will had not only murdered his mother-in-law but that also one Triguna Sundari Debi and had cut off four of the fingers of the hand of the said Srimati Sarola Sundari Debi and in addition to that, he struck the testator such a blow upon his face that he lost the sight of both his eyes and that in consequence of that unfortunate incident he had no training or education of any sort whatever and by constantly brooding over his misfortune he practically lost his memory and intelligence as well as balance of mind and lived the life of practical imbecility until his death: and, in paragraph 22 he went on to allege that the will was simply and wholly the act of Ashu Tosh Bannerjee and Srimati Sarola Sundari Debi (who are the executor and executrix of the will), in order to get the estate absolutely in their clutches and to get the son of the said Ashu Tosh Bannerjee adopted. I ought to have said that although we have not the will before us, we are informed that the main provisions of it are to the effect that the property was left to the widow with power to adopt a son, if she so desired. That was the position of affairs at the time when Satindra Mohan Tagore and Ronendra Mohan Tagore withdrew their caveats.

On the 30th of June 1915, the suit was set down as a contested suit. It appears that before that date an order had been made for a commission to issue for the examination of certain witnesses, namely on the 22nd of May 1915 : and, inasmuch as on the 18th of November Diptendra Mohun Tagore died, the death was recorded, and liberty was given to the commissioner to proceed with the commission. That was the state of affairs up to the end of November 1915.

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The next fact which is necessary for me to mention is this : Apparently, in December 1916, a proposed settlement with Bidyut Prokash Ganguli was made, and that is evidenced by a letter which was written on the 9th of December 1916 by Mr. Sen acting on behalf of the executor and the executrix, addressed to Messrs. Manuel Agarwalla and De who were acting as solicitors on behalf of the mother of the widow in these terms: "I have the pleasure to inform you that subject to the sanction of the Court my clients and Mr. B. Ganguli have arranged to settle this case amicably on the terms of which I enclose for your information, a copy. Having regard to the relationship of the parties and seeing that your client has no personal interest in the matter I trust you will agree with me that this settlement is very desirable and should be carried out." The material provisions of the settlement were as follows: Mr. B. Ganguli being the next reversioner after the widow of the deceased, in case no adoption takes place or fails, was to be paid out of the estate of the said A. N. Tagore the sum of Rs. 155,000 "out of which he will meet and pay his own costs and the costs of Sreemutty Hazari Dasi Debi, the mother of the said widow one of the defendants in the suit"; and that the said sum of Rs. 155,000 should be paid by the executor and executrix by sale or mortgage of a portion of the estate of the deceased within two months after the grant of probate. That agreement was to be subject to the sanction of the Court, as was provided by clause 6 of the agreement, namely, that these terms would be treated as without prejudice to any or either of the parties to the suit until recorded and confirmed by the Court with the usual certificate that they were for the benefit, of the infant widow. We do not know what took place after that but we must approach the case on the basis that the widow's mother has not agreed to that proposal up to the present time. Apparently, Satindra Mohan Tagore and Ronendra Mohan Tagore having got to know of this proposal proceeded on the 20th of December 1916 to file their second caveat, and the paragraph in their affidavit upon which they rely is paragraph 14 which is to this effect: "That pre-

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vicious to this there was no necessity for our entering caveat as we were under the impression that Bidyut Prokash Ganguli who had always maintained that the will was a forgery would properly prosecute the proceedings started on the caveat entered into by him, but now that he is willing to have probate granted of a forged will on being promised a large sum of money, we have been advised to contest the will which has been set up as aforesaid." That is the caveat which the learned Judge in the Court below has directed should be struck off the file.

Now, two main points have been raised in the argument in this Court. The first is that Satindra Mohun Tagore and Ronendra Mohun Tagore have not got sufficient interest to entitle them to file caveats against the will. The relationship is as follows: There is no doubt that Bidyut Prokash Ganguli is the immediate reversioner in case of the death of the widow without a son being adopted: and, that if Bidyut were to die before the widow then the persons who would then become the immediate reversioners are the appellants Satindra Mohan Tagore and Ronendra Mohan Tagore. There is no doubt that Bidyut Prokash Ganguli, the immediate reversioner is entitled to contest the will on the authority of the decision in the case of *Brindaban Chandra Shaha v. Sureswar Shaha Paramanick* (1), and it is said that that case is an authority for the proposition that any interest however slight, and even the bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper. In my judgment I do not think it necessary in this case for us to consider whether the rule laid down in the English cases has been adopted in this country as the rule applicable to such a case as this, because it was admitted during the course of the argument that if the immediate reversioner is not protecting the estate, then the next reversioner is entitled so to do: and, I intend to base my judgment in this case on the facts of this case and not to lay down any general rule upon the question whether any interest however slight, or even the bare possibility of an interest is enough to entitle a party to oppose a testamentary paper. With regard to Bidyut Prokash Ganguli, as I have already pointed out, he has entered into this agreement to the material terms of which I have already referred; and, in my judgment, he has thereby done his best to render it impossible for him successfully to challenge the will: or, looking at it from another point of view, in my judgment, he, by the agreement into which he has entered, has shown that at all events he cannot be relied upon seriously and successfully to contest

(1) (1909) 10 C. L. J. 263.

the will. But Mr. Das argued that it is not a concluded matter because there is the mother of the widow who is contesting, and there is no suggestion that she is going to abandon the position which she has taken up in contesting the will. I assume that and I decide this case upon that assumption because Mr. Das has pointed out that he has not had an opportunity of answering the affidavit which had been put forward on the actual day of hearing before Mr. Justice Chitty. But even assuming that the widow's mother at the present moment has not agreed to compromise the suit, I still think that under the special and peculiar circumstances of this case, the appellants Satindra Mohun Tagore and Ronendra Mohun Tagore have sufficient interest to entitle them to enter caveat and contest the suit. I do not think it necessary for me to say anything more upon that point.

The second point urged is that the appellants ought not to be allowed to enter caveats at this stage, because they had already entered caveats on a previous occasion and withdrew them and, to use the words of the learned Judge, 'they ought not to be allowed to blow hot and cold in that way.' The answer to that seems to me to be that it cannot be said to be a case of blowing hot and cold, because the conditions which existed when caveats were first entered and withdrawn do not exist at the present moment. The caveats were withdrawn, as I have already pointed out, when the opposition of Bidyut Prokash Ganguli could certainly be regarded as a genuine and strenuous opposition ; but having regard to the agreement into which he has entered I think, as I have already said, he cannot be relied upon in future seriously to contest the will. Therefore the conditions being different, the accusation of 'blowing hot and cold' cannot reasonably be made against the appellants, and I do not think that that is sufficient reason for preventing them from filing caveats on the 20th of December, 1916.

The result, therefore, in my judgment is that the two appellants ought to be allowed to enter caveats. I think it would be a misfortune if there should be another suit, and consequently they ought to be added as defendants to the suit which is now proceeding. Mr. Sarkar has agreed that he will accept the evidence which has already been taken on commission, provided that he is allowed to have an opportunity of putting further questions in cross-examination, if he is advised so to do : and, the appellants will therefore be added as defendants to the suit upon the understanding that they will accept the evidence which has already been given, subject to any application which may be made by the appellants to the

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Judge trying the case for leave to put further questions in cross-examination. We cannot decide whether that leave ought to be granted or not, and it will be for the learned Judge trying the case to decide that.

For these reasons I think that the appeal should be allowed with costs here and in the Court of first instance.

Woodroffe, J.—I agree with the order proposed by the learned Chief Justice on this ground : the caveator Diptendra Mohan Tagore is dead, and the caveator Bidyut Prokash Ganguli has entered into a compromise to settle this litigation, and there is thus left out of the original caveators, only Sreemutty Hazari Devi acting on behalf of the minor widow. It seems to me that it is very likely that Hazari Devi was consulted about the compromise, and, though it has not been shown that she has actually assented to this compromise, I am not satisfied under the circumstances of this case that the interests of the reversioner appellants will be sufficiently protected unless they are allowed to intervene.

Messrs. B. N. Basu & Co :—Solicitors for the Appellants.

Mr. P. N. Sen :—Solicitor for the Respondent.

A. T. M.

Appeal allowed.

CIVIL RULE.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

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May, 3.

GOUR SUNDAR BHOWMIK AND OTHERS

v.

RAKHAL RAJ BHOWMIK.*

Appeal heard by a Division Bench of the High Court—Review—Jurisdiction of a single Judge to amend the judgment and decree—Review granted on a particular point, if re-opens the whole case—Qualified order, if can be passed on review—Rehearing of the case, if necessary—Civil Procedure Code (Act V of 1908), order XLVII, r. 8, scope of.

* Civil Rule No 273 of 1916, in the matter of an application for review of judgment passed by Holmwood and Mullick, JJ. in Appeal from Appellate Decree No. 145 of 1909, against the decree of Babu Pramatha Nath Chatterjee, Subordinate Judge of Nadia, dated the 23rd September, 1908, modifying the decree of Babu Lala Tarak Nath, Additional Munsiff at Kushtia, dated the 4th January, 1908,

As appeal was heard by a Division Bench of the High Court. One of the Judges constituting the Bench having subsequently ceased to be a member of the Court, an application for review of the judgment was presented to the other Judge, who issued a Rule, and not only made the Rule absolute with the consequence that the judgment and decree stood amended in the manner stated in the order for issue of the Rule, but also proceeded to act under rule 8 of order XLVII of the Code of Civil Procedure, with the result that the order made on the rehearing of the case was identical with the order whereby the Rule was made absolute. An appeal was then preferred against the judgment of the single Judge under section 15 of the Letters Patent, and the appellate Court holding that the single Judge had no jurisdiction to rehear the case under rule 8 of order XLVII of the Code, allowed the appeal, and directed that the appeal should be reheard. The appeal having then come on for hearing before another Division Bench of the Court, the Bench came to the conclusion that the appeal was not to be re-heard in its entirety, but the ground in support of the application for review of the previous judgment was the only ground open for consideration by them, and the Bench passed a decree identical with that passed by the Judge who heard the application for review of the previous judgment. Upon an application for review of the judgment passed by the Division Court having been presented on the ground that the whole appeal should have been re-heard :

Held, that there was an end of the matter as soon as the Rule issued by the Judge who heard the application for review of the first judgment was made absolute, by reason of which the judgment and the decree would as a matter of course be amended in the way he intended them to be amended, and in the way he intended them to be drawn up, and from that moment every other proceeding was superfluous.

Held, also, the judgment under review having been passed in an appeal concluded by a final decree it was not necessary to set it aside inasmuch as it only affirmed the final decree passed in the case.

Per Mookerjee, J.—A review may be granted either as to the entirety of the order assailed or as to portion only thereof.

Bhugwandeem Doobey v. Myna Bae (1); *Hurro Chunder v. Ram Kishore* (2); *Dhuronidhur v. The Agra Bank* (3), *Hurbans v. Thakoor Purshad* (4); and *Bhubaneswari v. Afodhya* (5) followed.

Sainal Ranchhod v. Dullabh Duarka (6); and *Emperor v. Narayan* (7) not approved.

Rule 8 of order XLVII of the Code of Civil Procedure clearly leaves it optional with the Court to determine whether when a review is granted, the case should be re-opened in part or in its entirety.

Jannakinath v. Prabhasini (8), *Sha Vadi Lal v. Fulchand* (9), and *Gopala v. Ramasami* (10) referred to.

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| (1) (1867) 11 Moo. I. A. 487 (499). | (2) (1864) W. R. 141. |
| (3) (1879) L. L. R. 5 Calc. 86. | (4) (1882) I. L. R. 9 Calc. 209. |
| (5) (1911) 15 C. L. J. 339. | (6) (1873) 10 Bom. H. C. R. 36a. |
| (7) (1907) I. L. R. 32 Bom. 111 (120). | (8) (1915) 19 C. W. N. 1077. |
| (9) (1905) I. L. R. 30 Bom. 56. | (10) (1907) I. L. R. 31 Mad 49. |

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Rule obtained by some of the Defendants.

The material facts will appear sufficiently from the judgments.

The appeal was heard by Mr. Justice Brett and Mr. Justice Richardson. Mr. Justice Brett then having left the Court, an application for review of the judgment was heard by Mr. Justice Richardson alone, who issued a Rule for amendment of the judgment and decree passed in the case, and made it absolute, and then proceeded to rehear the case, and in effect passed an order identical with what he passed by making the Rule absolute. Against that judgment of Mr. Justice Richardson an appeal was preferred under section 15 of the Letters Patent, and Sir Lawrence Jenkins, C. J., and Mr. Justice N. R. Chatterjea passed the following judgment:—

“We must set aside the decree of Mr. Justice Richardson as having been made without jurisdiction inasmuch as the Chief Justice did not determine that he should sit alone for the purpose of this case. The case must be restored to the appellate list to come before the Bench of the group in the usual way.

We say nothing as to the scope of the rehearing as that is a matter that does not arise before us at this stage.”

The case was then heard by a Division Bench of the High Court, consisting of Mr. Justice Holmwood and Mr. Justice Mullick, who held that the case was not to be re-heard in its entirety, but the ground urged before Mr. Justice Richardson in support of the application for review was the only ground open for their consideration, and passed a decree identical with that which had been made by Mr. Justice Richardson when he made the Rule for review absolute.

Against this decision an application for review of judgment was presented, and Mr. Justice Holmwood and Mr. Justice Mullick having ceased to be members of the Court in the meantime, the application was heard by the Chief Justice and Mr. Justice Mookerjee.

Babu Asita Ranjan Ghose for the Petitioners.

Babus Mahendra Nath Ray and *Manmatha Nath Ray* for the Opposite Party.

The following judgments were delivered:

Sanderson, C. J.—The learned vakil at the opening of his remarks for the purpose of showing cause stated that this was rather a peculiar matter. I entirely agree with him and I most sincerely hope that it is not only a peculiar matter, but also an exceptional matter, because the facts relating to the proceedings in this case are truly amazing there is no other word for them. The action was brought in November 1906, very nearly ten years ago by the plaintiff

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for the recovery of certain land. The Court of first instance gave the plaintiff a judgment. Then there was an appeal to the first appellate Court. That Court varied the judgment of the first Court by declaring that the plaintiff and the defendants were joint owners of the land. Then there was an appeal to the High Court, and the High Court consisting of Mr. Justice Brett and Mr. Justice Richardson allowed the appeal and restored the judgment of the Court of first instance, and thereby declared that the plaintiff was entitled to the possession of the land in question. Unfortunately by mistake,—it has not been made plain to me how the mistake arose—the decree gave the plaintiff something more than he asked for, inasmuch as it not only declared that the plaintiff was entitled to the possession of the land but it also declared that he was entitled to the possession of a building which was upon the land. That was a matter—which was obviously an error—and which, in my opinion, ought to have been set right as soon as the parties saw the decree. If that had been brought to the attention of the learned Judges before the decree was signed, it could have been set right in five minutes. Instead of that, in consequence of that mistake which was made in December 1912, proceedings have been going on in this Court from December 1912 down to May 1916. I think I am justified in saying that the proceedings in this case are nothing short of amazing. What happened then is this: An application was made to Mr. Justice Richardson, the other learned Judge, Mr. Justice Brett, having by this time left the Court: That was made in April 1913, and, Mr. Justice Richardson granted a Rule limiting it to this particular point, and calling upon the opposite party to show cause why the judgment and decree of this Court, dated the 12th December, 1912, should not be set aside or amended or why such other order should not be made as to this Court might seem fit on the ground that in giving the plaintiff a decree for the structures on the land this Court went beyond the reliefs claimed in the plaint: so that the Rule was granted on that one point only. In June 1913, this Rule was argued before Mr. Justice Richardson; and, after argument he made the Rule absolute. I agree, with what fell from my learned brother Mr. Justice Mookerjee during the course of the argument in the case, that there was an end of the matter, as soon as the Rule was made absolute, and, in accordance with that Rule the decree would, as a matter of fact, have been amended in respect of the point which was mentioned in the Rule that was granted. For some reason or other Mr. Justice Richardson was persuaded to re-hear the case under order XLVII, rule 8 of the Code of Civil Procedure and, after hearing

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the case he made the order which has been referred to and which is to this effect : "The judgment will therefore be altered in this way, that for the words 'with such structures as may be standing on the land' the following will be substituted, 'that the defendants do remove the structures from the land within two months from the date of this order. In the event of their failing to do so the plaintiff will be at liberty to remove them at the costs of the defendants to be realized in execution of the decree. A corresponding alteration will be made in the decree.'" Then he went on to say, "I make no order as to costs. The mistake should have been brought to notice before the decree was signed." Well, some ingenious person then thought of the point that Mr. Justice Richardson had no jurisdiction to rehear the case sitting by himself, and although he had jurisdiction to grant the Rule and to make the Rule absolute and thereby to make an order by which the judgment would be amended, still he had no jurisdiction to rehear the case in the proper sense of the word, as he by himself could not constitute a Division Bench. Therefore this point was taken and an appeal from his decision was instituted and it was heard in this Court by the late Chief Justice and Mr. Justice Nalini Ranjan Chatterjea, and they decided that he had no jurisdiction to rehear the case, because he was not a Division Bench, and they directed that the appeal should be reheard. As a result of that, two other learned Judges were called upon to hear this appeal, and Mr. Justice Holmwood and Mr. Justice Mullick heard it on the 24th of November 1915, some two years after the order which was made by Mr. Justice Richardson and having heard it they made an order identical in terms with the one that was made by Mr. Justice Richardson in the month of June 1913. The parties were not satisfied even then, but some of the defendants came here and obtained a Rule upon the ground that Mr. Justice Holmwood and Mr. Justice Mullick had not reheard the case. If I may say so with every respect to the learned Judges, I think they took a reasonable view of the matter. What they did was, they said that the whole of this matter arose from an obvious error, upon which the Rule was granted for review by Mr. Justice Richardson, and they confined themselves to that error and declined to go any further and said they had discretion in the matter. It is argued by the learned vakil that they were wrong in so doing and he wishes us to make the Rule absolute, so that this case may be reheard by two other learned Judges of this Court.

All I can say, speaking for myself is this : As far as I can understand the proceedings, when Mr. Justice Richardson made that

Rule absolute in June, 1913, by reason of which the judgment and the decree would as a matter of course be amended in the way he intended them to be amended and in the way he intended them to be drawn up, from that moment every other proceeding was superfluous. If we were to make this Rule absolute it would be a travesty of justice to which I will not be a party.

Therefore, in my opinion, this Rule ought to be discharged with costs—hearing-fee, two gold mohurs.

Mookerjee, J.—I agree that the order we are invited to review is substantially correct, notwithstanding the extraordinary errors which have characterised the proceeding in its later stages.

The suit was instituted so far back as the 12th November, 1906, for declaration of title to land and for recovery of possession thereof. It was decreed in the Court of first instance on the 4th January, 1908. On appeal by the defendants, the Subordinate Judge modified this decree. The result was that the present appeal was lodged in this Court on the 5th February, 1909, by some of the defendants. The plaintiff thereupon presented a petition of cross-objection. The appeal was heard in the first instance by Mr. Justice Brett and Mr. Justice Richardson on the 12th December, 1912; they dismissed the appeal and allowed the cross-objection, so that the decree of the primary Court was restored. The decree of this Court, however, contained a provision for possession of the structures on the land in a manner not contemplated by the plaint. The defendants took advantage of this error, and presented an application for review of judgment to Mr. Justice Richardson on the 28th April, 1913, after Mr. Justice Brett had ceased to be a member of the Court. Thereupon, Mr. Justice Richardson issued a Rule calling upon the opposite party to show cause why the judgment and decree, dated the 12th December, 1912, should not be set aside, or amended or why such other order should not be made as might seem fit, on the ground that, in giving the plaintiff a decree for the structures on the land, the Court had gone beyond the reliefs claimed in the plaint. This Rule was heard by Mr. Justice Richardson on the 5th June, 1913, as he was obviously competent to do, and was made absolute, with the consequence that the judgment and decree stood amended in the manner stated in the order for issue of the Rule. Mr. Justice Richardson however, not only made the Rule absolute, but proceeded to act under rule 8 of order XLVII of the Civil Procedure Code. That rule provides that "when an application for review is granted, a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to the

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re-hearing as it thinks fit." Mr. Justice Richardson apparently thought that it was incumbent upon him to rehear the case under rule 8 of order XLVII. The result of the re-hearing was that the alteration already mentioned was made in the judgment and decree. The substance of the matter was that the order made on the re-hearing of the case was identical with the order whereby the Rule was made absolute. An appeal was then preferred under clause 15 of the Letters Patent against the judgment of Mr. Justice Richardson, and was heard by Sir Lawrence Jenkins, C. J. and Mr. Justice N. R. Chatterjea. They allowed the appeal on the ground that Mr. Justice Richardson had no jurisdiction to rehear the case under rule 8 of order XLVII; but they not only cancelled that portion of his order, but proceeded to direct that the appeal should be re-heard. At the re-hearing, which took place before Mr. Justice Holmwood and Mr. Justice Mullick, the question was raised, whether the appeal was to be re-heard in its entirety or whether the ground urged before Mr. Justice Richardson in support of the application for review was the only ground open for consideration. The Court came to the conclusion that the latter course should be pursued. The result was that Mr. Justice Holmwood and Mr. Justice Mullick proceeded to make a decree identical with what had been made by Mr. Justice Richardson when he made the Rule for review absolute. We are now invited to set aside on review the decree made by Mr. Justice Holmwood and Mr. Justice Mullick on the ground that it was incumbent upon them to re-hear the entire appeal. In my opinion, there is no foundation for this contention.

In the first place, it is indisputable that a review may be granted either as to the entirety of the order assailed or as to a portion only thereof. This was laid down by the Judicial Committee so far back as 1867, in the case of *Bhagwandeon Dobay v. Myna Bae* (1) where Sir James Colvile observed that "the Judges who might have made a final order, granting or rejecting the application in *toto* or in part, were not incompetent to make the qualified order which they did make, leaving in the Court, which was to review the decision, a discretion as to the extent to which the review should be carried." This view had been adopted by this Court in 1864 in the case of *Hurro Chunder Chuckerbutty v. Ram Kissors* (2), and has been consistently followed in a long series of decisions: *Byjnath Sahoy v. Wuzeer Narayan* (3); *Dhuromidhar Sen v. The Agra Bank* (4); *Thacoor Prosad v. Baluck*

(1) (1867) 11 M. L. A. 487 (499).

(2) (1864) W. R. 141.

(3) (1875) 24 W. R. 427.

(4) (1879) I. L. R. 5 Calo. 86.

Ram (1); *Hurbans v. Thakoor Purshad* (2) and *Bhubaneswari v. Ajodhya* (3). Reliance has been placed on behalf of the petitioner on the observation in the case of *Sainal Ranchhod v. Dullabh Duarka* (4), that when a review of a decision has been admitted, the whole case is thereby re-opened—an observation quoted with approval in the case of *Emperor v. Narayan* (5). I am not prepared to accept this comprehensive statement as an accurate exposition of the law. Rule 8 of order XLVII, which reproduces section 630 of the Code of 1882, clearly leaves it optional with the Court to determine, whether, when a review is granted, the case should be re-opened in part or in its entirety. It is obvious that any other view might lead to grave inconvenience, if not injustice. It is conceivable that the different points in a case may be so inseparably connected with each other, that if the decision on one point is set aside, it becomes essential in the interests of justice that the whole case should be re-opened. On the other hand, cases are equally conceivable in which the different points may be so distinct, that reconsideration of one of those points may not necessitate the re-examination of the other points. Consequently, the view cannot be supported on principle that whenever an application for review is granted, the entire case must of necessity be re-opened and reconsidered. This view is supported by the decisions in *Sadaruddin v. Ekramuddin* (6); *Janaki Nath v. Prabhasini* (7); *Vadi Lal v. Fulchand* (8); and *Gopala v. Rama Sami* (9). These cases show that the Court may, in its discretion direct that the whole case be reopened, if it is necessary, in the interests of justice, that such a course should be adopted; but they are not authorities for the proposition that whenever a review is granted on a particular point, the whole case must be re-opened. The facts of the case before us offered a good illustration, why the contention of the petitioner should not be accepted. The point whereon the review was sought and granted, was absolutely distinct from the other points in the case. The question was whether the plaintiff should be allowed a decree for possession of the structures on the land or whether the defendants should be reserved liberty to remove them. The determination of this question did not in any way affect the other points in the case; it was also conceded that the erroneous order in the

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(1) (1882) 12 C. L. R. 64.

(3) (1911) 15 C. L. J. 339.

(5) (1907) I. L. R. 32 Bom. 111 (120).

(6) (1913) 18 C. W. N. 22.

(8) (1905) I. L. R. 30 Bom. 56.

(2) (1882) I L. R. 9 Calc. 209.

(4) (1873) 10 Bom. H. C. R. 360.

(7) (1915) 19 C. W. N. 1077.

(9) (1907) I. L. R. 31 Mad. 49.

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decree in this behalf had been made by an oversight. Clearly, it was not necessary in the interests of justice that if the decree were modified in this respect, the whole case should be re-opened. But, I am also of opinion that the case was concluded when Mr. Justice Richardson made the Rule absolute, and there was nothing further to reconsider or re-hear. Although, therefore, in this view, the judgment now under review was passed by Mr. Justice Holmwood and Mr. Justice Mullick in an appeal which had been concluded by a final decree made by Mr. Justice Richardson, still it is not necessary for us to interfere, as it merely repeats the decision of Mr. Justice Richardson. This Rule must accordingly be discharged with costs.

A. N. R. C.

Rule discharged.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Walmsley.*

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

DIGAMBAR NANDA.*

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May, 28, 29.

August, 22.

Bengal Tenancy Act (VIII of 1885), Sec 5—Raiyat or tenure-holder—Test—Intention of contracting parties—Presumption, where applicable—Tenancy, origin of, unknown—Bengal Tenancy Act (VIII of 1885), Sec. 104 H, suit under—Court, what to determine.

The mere fact that a tenant has sub-let his land, does not by itself establish conclusively that his status is that of a tenure-holder and not that of a raiyat. The test to be applied to determine the status of a tenant is the intention of the contracting parties.

In cases where the origin of the tenancy is unknown, the mode of user of the land may furnish a valuable clue to determine the original purpose of the tenancy and where the terms of the grant are ambiguous, evidence of conduct subsequent of the parties may also be admissible: *Promotho v Nilmoni* (1); *Promoda v. Astruddin* (2); and *Bamapada v. Midnapore Zemindary Co* (3) referred to.

*Appeal from Original Decree No. 252 of 1913, against the decree of Babu Achinta Nath Mitra, Subordinate Judge of Midnapur, dated the 26th March, 1913.

(1) (1911) 14 C. L. J. 38.

(2) (1911) 15 C. W. N. 896

(3) (1912) 16 C. L. J. 322.

The presumption laid down in section 5, sub-section (5) of the Bengal Tenancy Act, is not applicable when the terms of the original grant are known.

It was recited in an *amalnama* granted on the 19th June, 1868, that the *mousahs* mentioned therein were settled with the grantee for bringing them under cultivation. It also specifically directed the grantee to extirpate wild beasts and by clearing out jungle and raising embankment at his own expense to carry on cultivation and tillage and enjoy the crops thereof. No rent was settled at the time but the *amalnama* recited that a *pottah* would be granted at the proper rent in the following year. On the 14th June, 1869, the grantor executed a *pottah* in favour of the grantee. This instrument recited that on the strength of the *amalnama*, the grantee had taken possession of land exceeding 2000 bighas in area and that he had at his own expense commenced to reclaim jungles, to raise embankments and to cultivate the lands. The settlement was made for a term of 19 years for carrying on cultivation at a progressive rate of rent. The document further authorised the grantee to continue to enjoy the profits of the lands by bringing them under cultivation either by himself or by making settlements with tenants, and a covenant was inserted to the effect that if the grantee did not cultivate the lands fit for cultivation within the term of the lease, he would be liable to compensation for loss that might be sustained by the grantor :

Held, that the settlement was of a raiyati holding and not of a tenure and that the grantee was a raiyat.

In a suit under section 104H of the Bengal Tenancy Act, it is not sufficient for the Court to hold that the entry in the settlement rent roll as to the status or the rent is erroneous. The Court must determine affirmatively the exact conditions and incidents of the tenancy as also the rent to be settled on such basis.

Appeal by the Defendant.

Suit under section 104 H of the Bengal Tenancy Act for declaration that the plaintiff was an occupancy raiyat in respect of the subject matter of the litigation and for incidental reliefs.

The material facts and arguments appear from the judgment.

Babu Ram Charan Mitra for the Appellant.

Mr. B. Chakrabarti, Babus Sib Chunder Palit, Khirod Narayan Bhuiya and Dharendra Krishna Roy for the Respondent.

C. A. V.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the Secretary of State for India in Council in a suit instituted by the respondent under section 104 H of the Bengal Tenancy Act for declaration that he is an occupancy raiyat in respect of the subject-matter of the litigation and for incidental reliefs. The Subordinate Judge has decreed the suit and has held that the plaintiff is not a tenure-holder but an occupancy raiyat and that the existing rent which the plaintiff was liable to pay before the last survey and settlement proceedings was fair and equitable. The

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substantial question in controversy, consequently, is whether the plaintiff is an occupancy raiyat as he alleges or whether he is a tenure-holder as recorded by the revenue authorities. The root of the title of the plaintiff is an *amalnamah* granted on the 19th June, 1868, to his father by Lal Chand Bhuia, the then settlement-holder under the Government. This document recites that the mauzas mentioned were settled with the grantee for bringing them under cultivation, and it specially directs the grantee to extirpate wild beasts and by clearing out jungle and raising embankments at his own expense to carry on cultivation and tillage and enjoy the crops thereof. The express purpose of the grant consequently was reclamation and cultivation of the lease-hold lands by the grantee. No rent was settled at the time but the *amalnamah* recites that a pottah would be granted at the proper rent in the following year. On the 14th June, 1869, the grantor executed a pottah in favour of the grantee. This instrument recites that, on the strength of the *amalnamah* Bholanath Nanda had taken possession of land exceeding two thousand bighas in area and that he had at his own expense commenced to reclaim jungles, to raise embankments and to cultivate the lands. The settlement was made for a term of 19 years for carrying on cultivation at a progressive rate of rent. The document further authorised the grantee to continue to enjoy the profits of the lands by bringing them under cultivation either by himself or by making settlement with tenants, and a covenant was inserted to the effect that if the grantee did not cultivate the lands fit for cultivation within the term of the lease, he would be liable to compensation for loss that might be sustained by the grantor. In our opinion, this document leaves no room for doubt that the settlement was of a raiyati holding and not of a tenure. The *amalnamah* was expressly granted for the purpose of reclamation and cultivation by the grantee, and the regular lease which followed did not indicate any intention to alter the nature of the tenancy. Stress has been laid, however on the circumstance that under the lease the grantee was authorised to cultivate the land, either by himself or by making settlement with tenants. This clause obviously does not show conclusively that the tenant was a tenure-holder and not a raiyat. A tenure-holder may settle a raiyat on the land of his tenancy, and, a raiyat also may, in his turn, sublet the land of his holding to an under-raiyat. Consequently, the mere fact that a tenant has sub-let his land does not by itself establish conclusively that his status is that of a tenure-holder and not that of a raiyat. The test to be applied to determine the status of a tenant is the intention of the contracting parties.

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Section 5, sub-section (1) of the Bengal Tenancy Act defines a "Tenure-holder" to mean primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent or bringing it under cultivation by establishing tenants on it. Sub-section (2) of section 5 defines "raiyat" to mean primarily a person who has acquired such a right to hold land for the purpose of cultivating it by himself or by members of his family or by hired servants or with the aid of partners. Sub-section (3) further provides that a person shall not be deemed to be a raiyat unless he holds lands either immediately under a proprietor or immediately under a tenure-holder. These definitions show that there may be a tenure-holder directly under a proprietor as there may be a raiyat directly under a proprietor. The test to be applied in each case is furnished by section 5, sub-section (4), namely, the purpose for which the right of tenancy was originally acquired. Sub-section (5) formulates a rebuttable presumption, namely, that where the area held by the tenant exceeds one hundred standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shown. There is no room, however, for the application of this statutory presumption when the terms of the original grant are known, as in the case before us. To ascertain the status of the plaintiff, we must consequently determine the purpose for which the tenancy was originally created; did the grantor intend to carve out the interest of a middleman or did he intend to settle the land with a person who would bring the lands under cultivation. The mere fact that the plaintiff has sub-let the land is not decisive, because a tenure-holder, though a middleman who collects rent, may yet cultivate a portion of the land himself, just as much as a raiyat, though himself a cultivator, may settle a portion of the land with under-raiyats. In cases where the origin of the tenancy is unknown, the mode of user of the land may furnish a valuable clue to determine the original purpose of the tenancy, and where the terms of the grant are ambiguous, evidence of conduct subsequent of the parties may also be admissible: *Promotho v. Nilmoni* (1); *Promoda Nath v. Asiruddin* (2); *Bamāpāda Roy v. Midnapore Zemindary Co.* (3). The case before us, however, is free from the difficulty which arises when the terms of the original grant are either unknown or ambiguous. Here the *amalnāmah* which sanctioned the entry of the grantee on the land demised and the lease which followed, makes it plain beyond controversy that the

(1) (1911) 14 C. L. J. 38.

(2) (1911) 15 C. W. N. 896.

(3) (1912) 16 C. L. J. 322.

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purpose of the settlement was reclamation and cultivation by the grantee himself. The interest created was consequently that of a raiyat and not that of a tenure-holder. In this view, it is needless to consider the conduct of the parties. But we may observe that the judgment of the Subordinate Judge shows and his view is amply sustained by the materials on the record that the settlement authorities have from time to time, regarded the plaintiff and his predecessor, not as tenure-holders but as raiyats entitled to a right of occupancy. Stress was laid by the appellant on the decisions in *Secretary of State for India v. Jadav Chandra Misra* (1), and *Secretary of State for India v. Gobind Prasad Barik and others* (2). No useful purpose would, however, be served by an analysis of decisions given on entirely different sets of circumstances, and we may usefully recall the emphatic protest of Lord Haldane L. C. in the case of *Kreglinger v. New Patagonia Meat Co.* (3), against the abuse of judicial precedents, when they are cited, not as authorities for principles enunciated therein, but as guides in the determination of the rights of parties which are dependent on the facts of individual case, and the contractual obligations enforceable between them. We must accordingly confirm the findings of the Subordinate Judge that the plaintiff is a raiyat and not a tenure-holder.

The next question which requires examination is, is the plaintiff an occupancy or a non-occupancy raiyat, and what is the fair rent assessable on the lands in suit according to his status. In the Court below, it appears to have been assumed that if the plaintiff was, not a tenure-holder as found by the revenue authorities, he must be an occupancy raiyat. This, however, does not necessarily follow. Indeed, it has been argued before us that after the creation of the holding, the plaintiff was, for a period an ijaradar, and that this circumstance interrupted the growth and perfection of the right of occupancy. This is an aspect of the matter which has not been fully investigated. Besides this, the question of the fair rent payable by the plaintiff must depend upon his precise status, and till that has been determined with accuracy, it is impossible to ascertain the amount of rent to be settled. In a suit under section 104 H, it is not sufficient for the Court to hold that the entry in the settlement rent roll as to the status or the rent is erroneous. The Court must affirmatively determine the exact conditions and incidents of the tenancy as also the rent to be settled on such basis; this is obvious, as under sub-section (7) the rent settled by the Court is deemed to

(1) (1916) 21 C. W. N. 452.

(2) (1916) 21 C. W. N. 505.

(3) (1914) A. C. 25 (40).

have been duly settled in place of the rent entered in the settlement rent roll. It is consequently impossible to affirm the decree of the Subordinate Judge, although we hold that his view that the plaintiff is not a tenure-holder is correct.

The result is that this appeal must be allowed and the decree of the Court below set aside. The decree of this Court will declare that the status of the plaintiff is that of a raiyat and the case will be remitted to the Subordinate Judge, to determine whether the plaintiff is an occupancy raiyat or a non-occupancy raiyat and then to ascertain the fair rent payable by him. The plaintiff will have half his costs both here and in the Court below. The costs after remand will abide the result.

A. T. M.

Appeal allowed : Case remanded.

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Digambar.*Mookerjee, J.**Before Mr. Justice N. R. Chatterjea and Mr. Justice Walmsley.*

GIRIJA NATH ROY CHOUDHRY AND OTHERS

v.

KANAI LAL MITRA AND OTHERS.*

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July, 31.
August, 29.*Civil Procedure Code (Act V of 1908), Sch. II, para 1—Reference to arbitration—*

"All the parties interested," not joining in the reference—Award, validity of—Objection to the validity of the award taken by a party who joined in the reference, if to be given effect to—Objection at the appellate stage, if can be entertained—Decree upon the award based upon the invalid reference—Appeal.

In a suit brought by the plaintiffs against several defendants, an application was made by the plaintiffs and the defendants *who appeared*, to refer the matter in dispute to arbitration and a decree was passed by the Court against all the defendants in conformity with the award submitted by the arbitrator. Upon an appeal having been preferred by the plaintiffs against the decree ;

Held that, all the defendants being persons interested in the suit and not having joined in the reference to arbitration, the arbitration was wholly invalid.

Parsidh Narain Singh v. Ghanashyam Narain Singh (1) and *Seth Dooly Chand v. Mamuji Musaji* (2) followed.

Ghulam Khan v. Muhammad Hassan (3) referred to.

*Appeal from Original Decree No. 601 of 1914, against the decree of Babu Ashutosh Sarkar, Subordinate Judge of Howrah, dated the 3rd September, 1914.

(1) (1905) 9 C. W. N. 873.

(2) (1916) 25 C. L. J. 339.

(3) (1901) I. L. R. 29 Calc. 167.

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Held further, that the Court could not refuse to entertain the objection as regards the invalidity of the award merely because it was taken by the plaintiffs and not by the defendants who had not joined in the application for reference to arbitration, or because it was neither taken in the Court of first instance nor taken specifically in the grounds of appeal to the High Court.

Raja Har Narain Singh v. Chaudhrani Bhagwant Kuar (1) referred to.

Held also, that having regard to the fact that the objection related to the jurisdiction of the Court to make the reference, and that the reference was altogether invalid, an appeal lay against the decree based upon the award, and the decree of the lower Court upon the award based upon the invalid reference was liable to be set aside.

Appeal by the Plaintiffs.

Plaintiffs brought a suit for an account against the defendant No. 1, Kanai Lal Mitra, who was engaged as their agent and am-mukhtear to look after all their cases and execution and other proceedings in the Uluberia Munsiff's Courts. Defendants Nos. 1, and 3 to 7, and defendant No. 2, since deceased, executed a surety bond in favour of the plaintiffs for the due performance of the duties enumerated in that deed, and had hypothecated the properties mentioned in the schedule of the plaint. Plaintiffs prayed for a decree against defendant No. 1 and the other defendants to render accounts for defendant No. 1's service as am-mukhtear and agent, and for the recovery of the amount that may be found due on the taking of accounts, and for a declaration of a lien on the hypothecated properties in accordance with the terms of the surety-bond executed by the defendants. The suit was valued at Rs. 6,488 and odd. Defendant No. 1 and the defendants substituted in place of the deceased defendant No. 2, only appeared and filed written statements denying the liability to render accounts. Several issues were framed by the Subordinate Judge, and an application having been made by the plaintiffs and the defendants *who appeared*, the matter in dispute between the parties was referred to arbitration, and the arbitrator entered upon the arbitration and made his award whereby he found that the plaintiffs were entitled to a decree for the sum of Rs. 753 and odd with proportionate costs, and that the defendants Nos. 2 to 7 were liable as sureties. The plaintiffs thereupon filed a long list of objections for setting aside the award, and contended *inter alia* that ample opportunity was not given to them by the arbitrator to adduce evidence etc. The learned Subordinate Judge after considering the evidence adduced by the parties came to the conclusion that there was no reason for setting aside the award, and passed a decree in accordance with the terms of the award.

(1) (1891) L. R. 18 I. A. 55; I. L. R. 13 All. 300.

Against that decree the plaintiffs preferred an appeal to the High Court.

Babu Mahendra Nath Ray for the Respondents, raised a preliminary objection that no appeal lay in the case. The decree passed by the Subordinate Judge was in accordance with the award of the arbitrator, and as such no appeal lay therefrom under para. 16 clause (a) of schedule II of the Civil Procedure Code.

Babu Dwarka Nath Chuckerbutty (with him *Babus Anilendra Nath Roy Chowdhury* and *Dhirendra Krishna Roy*) for the Appellants, submitted that "all the parties interested" in the suit not having joined in the application for reference, the Court had no jurisdiction to make the order of reference under para. 1 of schedule II of the Code, and as such the order of reference was wholly invalid. The cases of *Seth Dooly Chand v. Mamuji Musaji* (1), and *Ghulam Khan v. Muhammad Hussan* (2), were referred to. Paragraph 15 or 16, pre-supposes a valid reference. The parties having failed to comply with the fundamental requirements of the statute, the entire foundation of the jurisdiction was removed; and para. 16 could be no bar to the appeal. The cases of *Kali Prosanno v. Rajani* (3); *Ibrahim Ali v. Mohsin Ali* (4); *Najm-ud-din Ahmad v. Albert* (5); *Shib Lal v. Chatarbhuj* (6), and *Parsidh Narain v. Ghanshyam* (7) were relied on.

Babu Mahendra Nath Ray (with him *Babus Manmatha Nath Ray* and *Sishir Kumar Ghoshal*) for the Respondents: The case would clearly be governed by schedule II para. 16. Upon an application having been made to set aside the award, the Court held that the application should be refused. The objection which is now taken was never raised in the lower Court, nor taken in the memorandum of appeal to this Court. Besides, plaintiffs who have preferred this appeal joined in the application for reference, and the defendants who did not appear, did not object to the award. The award was binding, at any rate, as against the parties who joined in the application for reference. In support of his contention he relied on the cases of *Lal Mohon Pal v. Surja Kumar Das* (8); *Ishar Das v. Keshab Deo* (9) and *Lutawan v. Lackya* (10).

Babu Anilendra Nath Roy Chowdhury in reply.

C. A. V.

(1) (1916) 25 C. L. J. 339.

(3) (1897) I. L. R. 25 Calc. 141.

(5) (1907) I. L. R. 29 All. 584.

(7) (1905) 9 C. W. N. 873.

(9) (1910) I. L. R. 32 All. 657.

(2) (1901) I. L. R. 29 Calc. 167.

(4) (1896) I. L. R. 18 All. 422.

(6) (1909) I. L. R. 31 All. 450.

(8) (1906) 11 C. W. N. 1152.

(10) (1913) I. L. R. 36 All. 69.

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Girdja

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v.

Kanal.

August, 29.

The following judgments were delivered :

Chatterjea, J.—This appeal arises out of a suit for accounts brought by the plaintiffs against the defendant No. 1, who was a gomasta of the plaintiffs, and the other defendants (defendants 2 to 7), who as sureties of the defendant No. 1, had executed a surety bond. The suit was originally filed in the Munsiff's Court on the 15th May, 1912, being valued at Rs. 900, subsequently the valuation was raised to 6,488 and the plaint was taken back from that Court and filed in the Court of the Subordinate Judge on the 16th June, 1913.

Only the defendants Nos. 2 and 3 appeared and filed a written statement in the suit, and on the 30th June, 1914, an application was made for referring the matter in dispute to the arbitration of one Amrita Lal Hazra. The Court accordingly referred the matter to the arbitrator, and the latter submitted his award on the 17th August, 1914, by which he held that the defendants were liable for Rs. 753-9-6 only. The plaintiff took objections to the award on various grounds, the main ground being that the arbitrator gave the plaintiff's man to understand that after making his own enquiries, the latter would be given an opportunity of proving his case, but that he gave his award without giving the plaintiff such opportunity. The defendant No. 1, however, denied this in his affidavit, and the Court below overruled the objection holding that the plaintiffs were not misled by the arbitrator, and there being no ground for setting aside the award gave judgments in conformity with it, and the suit was accordingly decreed for Rs. 753-9-6 against the defendants.

Upon these facts there is no appeal against the decree based upon the award, but it is contended before us that all the defendants not having joined in the reference to arbitration, the arbitration is wholly invalid. It appears that some of the defendants *vis.*, defendants Nos. 4 to 7 did not appear in the suit at all and the petition to the Court below to refer the case to arbitration was not signed by them or by any pleader on their behalf. Now, clause 1, paragraph 1 of the second schedule of the Civil Procedure Code provides that "Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may at any time before judgment is pronounced apply to the Court for an order of reference." It is essentially necessary therefore, that *all the parties interested* must agree before any reference can be made. It is true that the defendants Nos. 4 to 7 did not appear

in the suit, but the 7th issue in the case was "Did the other defendants (2 to 7) at any time act as am-mokhtear or agent and as such liable to the plaintiffs," and the decision of the arbitrator was that although they did not act as ammokhtears and could not therefore be held liable as such they had executed the security bond and were liable as sureties. The arbitrator accordingly made an award against all the defendants for Rs. 753-9-6, and the Court below has made a decree for that sum against all the defendants. It cannot therefore be said that the defendants 4 to 7 are not "persons interested" in the suit.

There has been considerable divergence of opinion upon the question whether an award under such circumstances is invalid only as regards those who did not join in the reference, or is invalid even against those who joined in it. The former view was taken in the earlier decisions of this Court, but in *Parsidh Narain v. Ghanshyam* (1), it was held (without reference to the earlier cases) that the award was invalid in its entirety. In a later case *Lal Mohan Pal v. Surya Kumar Das* (2), again the earlier view was taken, though one of the learned Judges was a party to the decision in *Parsidh Narain's* case (1).

In the Allahabad High Court judicial opinion on the point has varied considerably from time to time. In the most recent case however in our Court *Dooly Chand v. Mamuji* (3), the learned Judges were of opinion that the decision in the case of *Parsidh Narain* (1) was correct. The learned Chief Justice held that "if all the parties interested do not agree, then the Court has no jurisdiction to make the order of reference, and the order of reference is invalid not only against those who have not agreed but also against those who have agreed." Mookerjee J. referred to the decisions on the point and held that "the entire foundation of the jurisdiction is removed as soon as it is established that the parties had failed to comply with the fundamental requirement of the statute embodied in the first paragraph of the second schedule of the Civil Procedure Code." Having regard to the clear terms of the section which lays down that "all the parties interested" must agree in the reference, and to what was said by the Judicial Committee in *Ghulam Khan v. Muhammad Hassan* (4), viz. that "the agreement to refer and the application to the Court founded upon it, must have the concurrence of all parties concerned," we agree with the view taken by the learned Chief Justice and Mookerjee J.

(1) (1905) 9 C. W. N. 873.

(2) (1906) 11 C. W. N. 1152.

(3) (1916) 25 C. L. J. 339.

(4) (1901) I. L. R. 29 Calc. 167.

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In the present case the objection is taken not by the defendants 4 to 7 but by the plaintiffs. But had the objection been taken even by the defendants 2 and 3, we would have had to give effect to it having regard to *Dooly Chand's* case (1), and we do not see how we can refuse to entertain the objection because it is raised by the plaintiffs. The objection was not taken in the Court below, nor taken specifically in the grounds of appeal to this Court, probably because the case of *Dooly Chand* (1) had not then been decided, the only ground taken on the point being that the award was illegal and unenforceable. But an objection to the validity of an award made in contravention of the provisions in the last paragraph of section 521 of the old Civil Procedure Code (Act XIV of 1882) was allowed though raised for the first time before the Privy Council, Lord Morris observing "This objection was apparently not brought to the notice either of the Subordinate Judge or of the High Court. But the statute is there and the Judges were bound to take judicial notice of it." (See *Raja Har Narain Singh v. Chaudhrani Bhagwant Kuar* (2)).

Having regard to the fact that the objection relates to the jurisdiction of the Court to make the reference, and that the reference is altogether invalid, we are constrained to give effect to it. The decree of the Court below upon the award based upon the invalid reference is accordingly set aside, and the case sent back to that Court for trial. But the whole costs of the litigation subsequent to the submission of the award have been thrown away by reason of the omission of the plaintiffs to take the objection in the Court below. In these circumstances the plaintiffs appellants must pay the cost of the respondents of this appeal and the costs in respect of pleader's fee incurred by them in the lower Court. All other costs in the Court below will abide the result.

The records will be sent down without delay and we trust the Court below will take up the case as early as possible.

Walmsley J.—I agree.

A. N. R. C.

Appeal allowed: Case sent back.

[N.B. In this case an application having been made for refund of the Court-fees paid on the memorandum of the appeal, the Court served a notice on the Senior Government Pleader, and after hearing him and the appellants granted to the latter a certificate under section 13 of the Court-fees Act—Rep.].

(1) (1916) 25 C. L. J. 339.

(2) (1891) L. R. 18 I. A. 55.

PRIVY COUNCIL.

PRESENT :—*Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart, and Sir Lawrence Jenkins.*

METHARAM RAMRAKHIOMAL AND OTHERS

v.

REWACHAND RAMRAKHIOMAL AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF SIND.]

Hindu Law—Mitakshara—Joint family—Self-acquired property—Gains obtained from science or learning.

Although the Mitakshara lays down that “ what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brother and with the father ” this does not apply to gains which are the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person educated at the expense of the joint family. There is no authority in the Mitakshara for the contention that gains made personally and without the aid of joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of a family to which he belonged should in law be regarded as partible and not as his self-acquired property.

Appeal from a decree of the Court of the Judicial Commissioner of Sind, dated 24th June, 1910, confirming a decree of a single Judge of the Court exercising jurisdiction as the District Court of Karachi.

The facts of the case are sufficiently stated in their Lordships' judgment. The suit was brought by the appellants for a declaration that property which one Shewaram purported to devise as self-acquired was the joint property of a Hindu joint family to which he and they belonged, and that the will passed no title to it. Both the lower Courts held that the property in question was self-acquired. Leave to appeal to the Privy Council was granted on the ground that the appeal involved a substantial question of law, which had been expressly left open by the Board in *Paulien Valloo Chetty v. Paulien Sooryah Chetty* (1), viz, whether a mere general education such as Shewaram received was sufficient according to Hindu law to constitute his earnings joint family property.

P. O. Lawrence, K. C., and *E. B. Raikes* for Appellant : A general education imparted at the expense of the family makes the “ gains of learning ” of the person who receives it partible. The Mitakshara chapter 1, section 4, clauses 1-11 deals with effects not

(1) (1877) L. R. 4 I. A. 109; I. L. R. 1 Mad. 252.

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liable to partition. Clause 1 lays down the general rule that anything acquired by a man himself without detriment to the father's estate does not appertain to the co-heirs. This general rule runs throughout the section, the gains of science are separate only if the science is acquired without use of the father's goods (clause 6). The vernacular of science is *vidya*: science then meant knowledge of the Vedas, the only knowledge of those times: it is equivalent to education. The illustration given in clause 8 is that of science acquired when receiving a foreign maintenance: gains derived from such science are not partible. Science there means any knowledge gained at the family expense. To the same effect as the *Mitakshara* is the *Mayukha*, chapter 4, section 7, paras 2, 4.

[Sir L Jenkins remarked that the authority of *Mayukha* only extended to Bombay Island and Gujerat, that Sind had nothing to do with Gujerat, and that it was a mere accident of administration that it was associated with Bombay.]

In some of the earlier judgments the Courts came to the conclusion that although science included general education, yet if a son blossomed out into a particular line, his gains from that would not be partible. The first case of importance was *Chalakonda Alasani v. Chalakonda Ratnachalam* (1), which laid down that the gains of science were indivisible only when the science was imparted at the expense of persons not members of the earner's family. It was the case of the dancing girl specially educated at the expense of the joint family for her trade. The District Judge, Mr. Bellett, in an elaborate judgment, came to the conclusion, on the Sanskrit authorities, that the gains of the dancing girl were impartible: but his judgment was reversed by the Madras High Court (Phillips and Holloway, JJ.) who held that the gains of science imparted at the family expense are joint property. Holloway, J. at p. 78 seems to distinguish between ordinary and extraordinary gains. In *Dhunook dharee Lall v. Gunpat Lall* (2), the Calcutta High Court took a contrary view to Madras, and held that the fact of defendant having been educated at the expense of the joint family did not necessarily make his gains acquired by the aid of such education joint, but the facts of the case do not appear from either of the reports.

In *Bai Manchha v. Narotamdas Kashidas* (3), the Bombay High Court followed the Madras decision.

A later decision in Madras to the same effect was *Durvasula Gangadharadu v. Durvasula Narasamma* (4), where it was held

(1) (1864) 2 Mad. H. C. R. 56.

(2) (1868) 10 W. R. 122; 11 B. L. R. 201 (Note).

(3) (1869) 6 Bom. H. C. R. 1.

(4) (1872) 7 Mad. H. C. R. 47.

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of a vakil who had received a general education at the family expense were joint.

that the professional judgment of this Board in *Paulien Valloo Chetty* (1), where the point was discussed but the name of the judge was left open, and since then there seems to have been a distance on the part of Judges in India to follow the earlier decisions which would ordinarily be binding. There have been special and general education: *Boologam v. Swornam* (2); *Lakshman Bai* (3), where for the first time a distinction is made (4), and *Lachmin Kuar v. Debi Prasad* (5).

These four cases were wrongly decided and that the proper interpretation of the verses of the Mitakshara laid down in the earlier decisions has not been adhered to. The submission is that the true meaning of "science" is that given to it by the Courts before the Privy Council decision—that it is equivalent to ordinary knowledge.

In 1891 a bill was brought forward to make the gains of education impartible but it created so much sensation that the Government dropped it. The state of the law which that bill was designed to alter is the state of the law for which the appellants contend.

Mayne deals with the matter in para. 283. The view he there propounds so far as it deals with the construction of Mitakshara 1. 4. 8. is an innovation introduced from the Dayabhaga: it has no proper place in the western school of law. Mayne's observations are cited and misunderstood in *Lakshman Mayaram v. Jamnabai* (3).

This is not a case where the learner received only the same education as the rest of the family. He had a better education than his elder brother: nor is it material that his younger brothers received the same education as himself. Even if the property in suit were originally separate, there was an agreement by Shewaram to throw all his funds into the joint purse.

When the education was given none of these cases except *Bai Mancha v. Narothamdas* (6) had been decided. Shewaram and Metharam may have been doubtful as to the legal position; the arrangement between them, even if invalid as a contract for want of consideration, may have been good as a compromise. Till 1888 Shewaram never asserted self-acquisition.

(1) (1877) L. R. 4 I. A. 109; I. L. R. 1 Mad. 252.

(2) (1881) I. L. R. 4 Mad. 330. (3) (1882) I. L. R. 6 Bom. 225.

(4) (1890) I. L. R. 15 Bom. 32. (5) (1897) I. L. R. 20 All. 435.

(6) (1869) 6 Bom. H. C. R. 1.

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[The Board intimated that they did not desire to hear any argument for respondents, but would be obliged if respondent's counsel could refer them to any other authorities.]

De Gruyther, K. C., (*O'Gorman* with him): for the Respondent. Strange's Hindu law was referred to in terms a commentary, yet as regards the text it is the law and you start from it. The text of the Mitakshara is cited in Mr. Collett's judgment in *Alasani v. Chalakonda Ratnachalam* (1), *et seq*; In *Manu* 206, 208 there quoted, "without using the patrimony" means without using the family property in the actual exercise of the profession. So in *Mitakshara* Chap. 1, section 4, paras 10, 11 "to the detriment of the family estate" is equivalent to "without using the patrimony." This is made very clear in *Strange's Hindu Law*, at p. 213, "the essence of the exclusive title consists in its having been made by the sole agency of the individual, without employing for the purpose what belongs in common to the family." *Strange* goes to lay down (at p. 215) that the acquisition vests in the family only if the common fund has been *directly* instrumental: the emphasis is on the *direct*. He had given as his authority certain passages in the *Dayabhaga*, but on the general question whether property is joint or self-acquired there is no distinction between the two. These passages of the *Mitakshara* have also been translated by *Sir W. Jones*: he translated as "learning" what *Colebrooke* rendered as "science."

P. O. Lawrence referred to *Durga Dat Joshi v. Ganesh Dat Joshi* (2).

The judgment of their Lordships was delivered by

Sir John Edge—This is an appeal from a decree, dated the 24th June, 1910, of the Court of the Judicial Commissioner of Sind, which confirmed a decree, dated the 3rd April, 1908, of a single Judge of that Court exercising jurisdiction as the District Court of Karachi.

The suit in which this appeal has arisen was brought in the Court of the District of Karachi on the 26th May, 1905, by the appellants here to obtain a declaration that the property which one *Shewaram* purported to devise by his will and a codicil was the joint family property of *Shewaram*, the plaintiffs and some of the defendants, and that the will and codicil were inoperative to pass any title to the property. Other reliefs were claimed, to which it

(1) (1864) 2 Mad. H. C. R. 56.

(2) (1910) L. J. R. 32 All. 305.

is not necessary to refer. The executors of the will were amongst the defendants to the suit.

Shewaram died on the 27th May, 1899. He had been and was at the time of his death a member of a joint Hindu family, which was governed by the law of the Mitakshara. The plaintiffs were members of the same joint family. The question in the suit was whether the property of which Shewaram purported by his will and codicil to dispose was property of the joint family or was property self-acquired by Shewaram which had not been thrown by him into the joint stock of the family property.

The plaintiffs, Metharam, Shewaram, and the defendants, Rewachand and Hermandas, were sons of one Seth Ramrakhimal Jethanand, and they and others, parties to this suit, constituted a joint Hindu family. The family business was that of money-lending, and was carried on at Karachi, Seth Ramrakhimal being, until his death in 1884, the manager. On his death the money-lending business of the family was continued, and was carried on under the management of the plaintiff Metharam, who was the eldest son. Shewaram, who was the second son, was born in or about 1847. He was educated at the expense of the joint-family at the Government school at Karachi, which in the evidence is referred to as a High School. At that school Shewaram learned to speak and to write English. When he was 22 years old he became a pleader's clerk. He continued to be a pleader's clerk until 1878, when he entered the employment of Messrs. Volkart Brothers. He was subsequently in the employment of Messrs. Rose and Co., and in October 1881 he entered the employment of the firm of Charles Forbes and Co., as their head broker. With the latter firm he continued until he died in 1899. It may be assumed that the knowledge of English which Shewaram acquired at the Government school was of use to him as a pleader's clerk and in the other employments in which he was subsequently engaged. From the savings out of his salaries and brokerage, and from the profits which he derived from a money-lending business which he personally carried on, he acquired a fortune of about 2 lakhs and 50,000 rupees, which is represented by the property of which he purported to dispose by his will and codicil. The money-lending business which Shewaram personally carried on was started by him with capital derived from the savings out of his salary as a pleader's clerk, and without the aid of the joint fund.

In the plaint it was in effect alleged that the property of which Shewaram purported by his will and codicil to dispose had been

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acquired by him as a member of the joint family, and was joint family property of which he could not dispose by will, and alternatively that Shewaram had thrown his self-acquired property into the common stock with the intention that it should be treated as joint and not self-acquired property. In the written statements of the executors it was alleged that the property of which Shewaram had by his will and codicil disposed was his self-acquired property, and it was denied that Shewaram had thrown his self-acquired property into the common stock of the family. The learned trial Judge fixed the following amongst other issues which are now immaterial :—

2. Did Shewaram acquire the property in suit with the assistance of joint family funds?

3. If not, did Shewaram join the property to the common ancestral property?

Those issues were agreed to by the parties. No issue was suggested or fixed as to the education which Shewaram had obtained, nor was it contended before the trial Judge that the property in question had been acquired by Shewaram by means of any special or other education. The trial Judge, having stated in his judgment that the evidence in the case "covers nearly every year of Shewaram's active life, and details every incident from which an inference can be extorted that Shewaram's property was the property of the family," considered the evidence fully and in detail, and found the second and third issues in the negative, and dismissed the suit. The plaintiffs appealed to the Court of the Commissioner, and in their grounds of appeal did not suggest that the education which Shewaram had received at the expense of the joint family had been such as to entitle the joint family to the gains made by him as a pleader's clerk or in his subsequent employments, or as a money-lender. When, however, the appeal came on for hearing in the Court of the Commissioner the learned counsel who appeared for the plaintiff appellants contended, amongst other things, that it had been proved that Shewaram had obtained the posts from which he had derived his salary and brokerage through the general education which he had received from the joint family funds.

There is no evidence on the record to show what was the nature of the education which Shewaram received at the school at Karachi. Had the plaintiffs been in a position to prove that his education had been of an exceptionally high standard and more expensive than the education which ordinarily would be provided for a member of such a family as he belonged to, they could have raised an issue on that

subject and have called evidence in support of it. The learned Judges who heard the appeal considered that the English education received at the Government school at Karachi could not be regarded, for a well-to-do family, as more than a general education, and certainly was not a special education comparable with special training for the Bar or the Civil Service, and they concurred with all the material findings of fact of the trial Judge, and by their decree dismissed the appeal. From that decree this appeal has been brought.

In this appeal it has been contended on behalf of the plaintiffs that in arriving at their findings on the second and third issues the Courts below have misconstrued a document in writing. The document referred to was a letter which was written by Shewaram to his brother Metharam, and was as follows ;—

“My Dear Brother,

“I am ready to join my property with the family property, and take my share from it.

“SHEWARAM.

“Dated the 1st October, 1888.”

The trial Judge construed that letter as a conditional offer. “If you will come to partition I shall join my fund to yours” ; implying “If you don’t come to partition, I shall not join them.”

The plaintiffs endeavoured to prove by oral evidence that Metharam had asked Shewaram for a chit showing that the joint family fund, and Shewaram’s self-acquired fund were liable to be partitioned as a joint family fund, and that thereupon Shewaram wrote the letter of the 1st October, 1888. That story rested solely on the evidence of Metharam and Rewachand, and the trial Judge entirely disbelieved it. The Judges who heard the appeal construed the letter as an offer made by Shewaram during negotiations for partition, and found that the offer was never accepted. The Courts below rightly construed the letter. In their Lordships’ opinion, Shewaram’s letter affords strong evidence that on the 1st October, 1888, his contention was that the property which he had acquired was his self-acquired property, and was not the property of the joint family. If Shewaram had, before the 1st October, 1888, thrown his self-acquired property into the joint family fund there was no object in his writing the letter to Metharam, who was the manager for the joint family. In neither of the Courts below did the Judges misconstrue the letter of the 1st October, 1888 ; and the plaintiffs are concluded, so far as conclusions of fact to be drawn from the evidence are concerned, by the concurrent findings of fact of those Courts that the property in suit was

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the self-acquired property of Shewaram and that Shewaram did not join his self-acquired property to the joint family property.

It has, however, been contended on behalf of the plaintiffs that as Shewaram had received an education in English at the school at Karachi at the expense of the joint family, the property which he acquired must be attributed to that education, and must in law be held to be the joint property of the joint family. That contention depends upon the interpretation of texts of the Mitakshara, which are to be found in section 4, chapter 1. Section 4 deals with effects which are not liable to partition. Those texts of the Mitakshara translated by Mr. Colebrooke are as follows :—

"1. The author explains what may not be divided, 'whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property, which had been taken away, give it up to the parceners ; nor what has been gained by science.'"

"5. He need not give up to the co-heirs what has been granted by him through science, by reading the scriptures, or by expounding their meaning ; the acquirer shall retain such gains.

"6. Here the phrase 'anything acquired by himself without detriment to the father's estate,' must be everywhere understood ; and it is thus connected with each member of the sentence ; what is obtained from a friend, without detriment to the paternal estate ; what is received in marriage, without waste of the patrimony ; what is redeemed of the hereditary estate, without expenditure of ancestral property ; what is gained by science, without use of the father's goods. Consequently, what is obtained from a friend as the return of an obligation conferred at the charge of the patrimony ; what is received at a marriage concluded in the form termed Asura or the like ; what is recovered of the hereditary estate by the expenditure of the father's goods ; what is earned by science acquired at the expense of ancestral wealth ; all that must be shared with the whole of the brethren and with the father."

The Sanskrit word which Mr. Colebrooke translated as "science" was translated by Sir William Jones as "learning."

The earliest case, to which their Lordships have been referred, decided in India on the meaning of those texts of the Mitakshara was *Chalakonda Alasani v. Chalakonda Ratnachalam* (1). That case was decided by the High Court of Madras in 1864. It was a very peculiar case. The plaintiff and the two defendants were

(1) (1864) 2 Mad. H. C. R. 56.

dancing girls and constituted a Hindu joint family. The first defendant was the plaintiff's adopted daughter, the second defendant was the plaintiff's natural daughter. The plaintiff brought the suit to obtain possession, as the manager of the joint family, of gold and silver, jewels and other personal property which represented gains of the first defendant in her calling of a dancing girl, she also claimed certain household utensils and some other minor articles. The plaintiff had spent a considerable amount of money in educating the first defendant in singing and dancing.

Mr. Collett, who, as the Civil Judge of Vizagapatam, tried the suit, having in a learned judgment considered several Sanskrit texts, as translated, including the texts of the Mitakshara, Manu, Yajñavalkya, Narada, and the Daya Bhaga and the works of some modern writers on Hindu law, said :—

"I am sure I am laying down an equitable rule, and I believe also the rule most consistent with the weight of authority. There is no doubt some conflict of opinion; but I think that the true position is that the mere fact of a Hindu having received a professional education at the expense of his family, as for instance from his father, does not render all his subsequent professional earnings liable to be divided with his brothers. I believe that on a due consideration of the authorities the rule of law is not really different in respect to property acquired by learning to what it is in respect to property acquired by agriculture or by trade. The test is the substantial use of joint property during and for the purpose of the acquisition, if there is none such, then the acquisition does not become joint property."

Mr. Collett made a decree in favour of the defendants with the exception of the house-utensils and some other minor articles. From that decree the plaintiff appealed to the High Court of Madras. Phillips and Holloway, JJ., in their judgment in the appeal, said :—

"We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science which have been taught at the expense of the family funds, are not impartible. To render them so the science or learning must have been imparted by persons not members of the learner's family," and they allowed the appeal.

In *Dhunookdharee Lall v. Gunput Lall and others* (1), which was decided by the High Court of Bengal in 1868, the defendant proved that in acquiring the property, which was alleged to be joint property, he did not use any of the property which belonged to the joint family,

(1) (1868) 10 W. R. 122.

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and L. S. Jackson and Dwarkanath Mitter, JJ., in appeal dismissed the suit. Dwarkanath Mitter, J., added :—

“ His (the plaintiff's) case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it.”

In *Bai Manchha v. Narotamdas Kashidas and others* (1), which was decided by the High Court of Bombay in 1869, one Jamnadas, a deceased member of a joint Hindu family, had made money as a vakil and as a money-lender, and it was held by Couch, C.J., and Newton, J., that the onus of proving that the property so acquired by Jamnadas was his self-acquired property was upon the party alleging that it had been self-acquired. Those learned Judges approved of the judgment of the High Court of Madras in *Chalakonda Alasani v. Chalakonda Ratnachalam and another* (2).

In *Durvasula Gangadharudu v. Durvasula Narasammah and others* (3), which was decided by the High Court of Madras in 1872, it was proved that a vakil had received from his father nothing more than a general education, and it does not appear that the vakil was distinguished by his professional learning. Kindersley, J., considered that the fair presumption was that such attainments as the vakil possessed had been acquired with the assistance of the family means, and that presumption not having been rebutted by evidence of the acquisition of such attainments without such assistance, he held that the professional earnings of the vakil were subject to partition. The judgment of Kindersley, J., suggests that he considered that if the professional gains of the vakil had not been merely the result of the general education which he had received at the expense of the joint family to which he belonged, but had been the result of much legal learning or skill, his professional gains would have been his self-acquired property. Holloway, J., entertained no doubt that the fund representing the professional earnings of the vakil was partible, and expressed his full adherence to the judgment of the High Court of Madras in *Chalakonda Alasani v. Ratnachalam and another* (2), and especially to the statement in that case, that the ordinary gains of science by one who has received a family maintenance are certainly partible, and concluded his judgment by observing, “ I do not believe, moreover, that within the meaning of

(1) (1869) 6 Bom. H. C. R. 1.

(2) (1864) 2 Mad. H. C. R. 56.

(3) (1872) 7 Mad. H. C. R. 47.

the authorities the vakil's business is matter of science at all." Apparently Holloway, J., regarded the learning in the law required by a vakil of his day as inferior to the science necessary to her success in her line of life of an Indian dancing girl.

In *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty* (1), which came before this Board in 1877, the Board, on the evidence, found that the son had not been educated by means of any joint fund of the family, but out of the separate estate of his father, over which the father had an absolute power of disposition. In that case the *Mitakshara*, chapter 1, sections 4, 6, 7, and 8, and the decisions in *Chalakonda Alasani v. Chalakonda Ratnachalam and another* (2); *Dhunookdharee Lall v. Gunput Lall and others* (3); *Bai Manchha v. Narotamdas Kashidas and others* (4); and *Durvasula Gangadharudu v. Durvasula Narasammah and others* (5), were referred to in argument before the Board, and their Lordships with reference to them observed—"it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property, is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text-books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case (3) reported in the tenth volume of *Sutherland's* 'Weekly Reporter,' in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in Madras, the first being to the effect that a woman adopting a dancing girl and supplying her with some means of carrying on her profession was entitled to share in her gains; and the second, to the effect that the gains of a vakil who has received no special education for his profession are to be shared in by the joint family of which he is a member; decisions which have been to a certain extent also acted upon in Bombay.

(1) (1877) L. R. 4 I. A. 109; I. L. R. 1 Mad. 252.

(2) (1864) 2 Mad. H. C. R. 56.

(4) (1869) 6 Bom. H. C. R. 1.

(3) (1868) 10 W. R. 122.

(5) (1872) 7 Mad. H. C. R. 47.

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It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of Bengal is not more correct than what appears to be the doctrine of the Courts of Madras."

That intimation appears to have had its effect upon Courts in India.

In *Boologam v. Savornam* (1), which was decided in 1881, Innes and Kernan JJ., on the evidence having found that the earnings of the dancing girls, who had received an ordinary education sufficient to fit them to earn a living as dancing girls, were acquired by them without detriment to the family estate and without any scientific acquirements which had been imparted by the aid of the family funds held that the earnings of the girls were their self-acquired property.

In *Lakshman Mayaram v. Jamnabai* (2), which was decided in 1882, Melvill and Kemball, JJ., who considered that the dictum of Mitter, J., in *Dhunookdharee Lall v. Gunput Lall and others* (3), that the Hindu law nowhere sanctions the contention that acquisition of a member of a Hindu family who has received education is liable to partition, is not strictly accurate, held that when the Hindu texts "speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the stepping stone of all science," and consequently that the property which was acquired by a Subordinate Judge who had received a mere elementary education at the family expense, but had obtained in a lawyer's office and in the Sadar Adalat that knowledge of law and judicial practice which had qualified him for the post of a Judge, was his self-acquired property and was impartible.

In *Krishnaji Mahadev v. Moro Mahadev* (4), which was decided in 1890, Birdwood and Candy, JJ., held that the gains made as *karkuns* by two members of a joint Hindu family who had received only a rudimentary education at the expense of the joint family were their self-acquired property.

In *Lachmin Kuar and another v. Debi Prosad* (5), Burkitt and Dillon, JJ., in 1897, approved of the decision in *Krishnaji Mahadev v. Moro Mahadev* (4), and following it held that the gains from employment in the Commissariat Department of a member of a joint Hindu family, who was not shown to have had any assistance

(1) (1881) I. L. R. 4 Mad. 330.

(2) (1882) I. L. R. 6 Bom. 225.

(3) (1868) 10 W. R. 122.

(4) (1890) I. L. R. 15 Bom. 32.

(5) (1897) I. L. R. 20 All. 435.

from the joint family funds except his support in early years and the usual rudimentary education, were his self-acquired property.

With the exception of the cases to which they have referred, no case decided in India, or in which this Board has expressed an opinion on the question as to whether the gains of a member of a joint Hindu family, who had been educated at the expense of the joint family, are in law to be considered as his or her self-acquired property or as belonging to the joint family, has been brought to the attention of their Lordships.

Their Lordships will assume that the Sanskrit word used in the Mitakshara which Mr. Colebrooke translated as "science" means "learning." The latter apparently is the meaning of the word which has been generally accepted by the Courts in India. It gives the Sanskrit word a wider meaning than it would otherwise have. It would be difficult, if not impossible, to ascertain what could have been the science or sciences which the author of the Mitakshara, Vijnanesvara, who wrote his commentary in the latter part of the eleventh century, had in contemplation if he used a word which meant "science" strictly so called and is not susceptible of the wider and more comprehensive meaning "learning."

In construing the texts of the Mitakshara which their Lordships have quoted, it is necessary to bear in mind that education beyond that of a very elementary kind must have been limited to very few of the people for whose guidance the Mitakshara was written, and that for that limited few there could have been then no education attainable in the arts, sciences, and professions of that time comparable with the education now obtainable and necessary for a successful career in the arts, sciences, and professions of the present day. It may be assumed that the author of the Mitakshara, who was construing and explaining the more ancient texts of the Hindu law for the benefit and guidance of the Hindu community, could not have intended to penalise an education which was not in his contemplation and of which necessarily he knew nothing. Nor can it be assumed that his intention was to penalise and discourage self-acquired skill, or the exercise of high mental abilities or great individual effort in winning success in an art, or science, or a profession. He must have been writing of education—learning—such as he knew it to be, and when he laid down that the gains obtained from an education received at the expense of a joint family should be partible, he could not have intended that such gains should include the gains which were the result, not of the

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education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person who had been educated at the expense of the joint family. Their Lordships cannot find in the texts of the Mitakshara any authority for the contention in this case that the gains made as a clerk, as a broker, or as a money-lender, personally and without the aid of the joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property. The question of whether a man who happening to be a member of a joint family carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family for the benefit of the joint family, is a question of fact to be determined on the evidence. No inferences can be drawn from the fact that until Shewaram became a pleader's clerk he was maintained by the joint family funds. As a member of the joint family he was entitled to be maintained at the expense of the joint family, and to receive an ordinary education suitable to a person of his position, as was any other member of the family.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

T. L. Wilson & Co. : Solicitors for the Appellants.

Drake, Son & Parton : Solicitors for the Respondents.

J. M. P.

Appeal dismissed.

PRESENT:—*Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart, and Sir Lawrence Jenkins.*

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BHAGWANDAS PARASRAM (A FIRM)

v.

BURJORJI RUTTONJI BOMANJI.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Wagering contracts—Common intention to wager essential—Speculation not equivalent to wagering—Pakki Adat.

Speculation does not necessarily involve a contract by way of wager; to constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for. Pakki Adat dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.

Burjorji Rustemji v. Bhagwandas Parashram (1) reversed.

Appeal from a decree of the Bombay High Court, dated March 1913, reversing a decree of Beaman, J.

The facts appear from their Lordships' judgment and from the reports, *Bhugwandas v. Burjorji* (2), and *Burjorji v. Bhagwandas* (1).

Sir W. Garth for Appellant: The appellate Court have erred in holding that the contracts sued on are wagering contracts. This Board have held that the law as to wagers formerly in force in India has been superseded by section 30 of the Indian Contract Act, which in Bombay is supplemented by Bombay Act III of 1865, sections 1, 2. The appellant firm were *Pakka Adatias*. A *pakka Adatia* can accept the contract himself, or can pass it on: in either case he guarantees the price and gets a commission. What the *Pakka Adatia* does with the contract does not concern the principal at all. As to the custom of *Pakki Adat*, see *Bhagwandas Narotomdas v. Kanji Deoji* (3), the authority of which has been accepted in this case by both the lower Courts.

The appellate Court, though not suggesting that we ourselves could win or lose by the rise or fall of the market, have held that, we were gambling ourselves with reference to the sub-contracts into which we entered. The only points they rely on are, firstly a conversation with our gomasta, who is reported to have said that 300 tons of linseed were bought by us "for Court purposes." Our representative was not even cross-examined as to this. Secondly, the fact that in all the sub-contracts delivery to a particular Marwari firm was barred. This, the appellate Court say, was because that firm might require delivery, but of this there is no proof. These points were not raised in the pleadings. The onus of proof on these two matters is on defendant-respondent, and he has altogether failed to discharge it.

Appellants here were mere commission agents, entitled to remuneration and re-imbursement of expenses, but they took no risks. It is the essence of a wager that each side should stand to

(1) (1913) I. L. R. 38 Bom. 204. (2) (1912) I. L. R. 37 Bom. 347.

(3) (1905) I. L. R. 30 Bom. 205 (210-215).

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win or lose according to the result of the event as to which a risk is taken: *Sassoon v. Tokersey Jadhawjee* (1).

Respondents did not appear.

Their Lordships' judgment was delivered by

Sir Lawrence Jenkins.—This appeal arises out of a suit for the recovery of money. Many defences have been pleaded, but only one need now be noticed; it is that the transactions on which the claim rests were agreements by way of wager. At the trial several issues were framed, and the third was in these terms:—

“Whether the transactions mentioned in the plaint are not wagering transactions and whether the plaintiffs were not aware of the defendant's intention to deal in differences only?”

The trial Judge, sitting on the original side of the High Court at Bombay, found all the issues in the plaintiff's favour, and passed a decree for the amount claimed.

On appeal the appellate bench of the High Court agreed with the findings of the trial Judge on all the issues but the third. On that it held in favour of the defendant, and dismissed the suit.

It is from that decree that this appeal has been preferred by the plaintiffs, and the only question is whether the plea that the transactions were by way of wager has been established.

At the date of these transactions the plaintiffs were a firm carrying on a large mercantile business at Bombay; and, as a branch of it, they were in the habit of acting as *Pakka Adatias*. The defendant, on the other hand, was a young man without any regular business, who, with the aid of winnings in a lottery, engaged in speculative transactions on the Bombay market.

In June and July 1910, he instructed the plaintiffs to sell for him three several lots of linseed amounting in all to 4,000 tons for September delivery.

On the strength of this order the plaintiffs sold linseed to this amount by separate contracts to thirty-nine buyers. Though the transactions took the form of sales by the defendant to the plaintiffs, followed by resales by the plaintiffs to thirty-nine buyers, the plaintiffs acted throughout as *Pakka Adatias*, and, to secure them against loss, sums amounting in the aggregate to 61,000 rupees, were deposited with them by the defendant as margin money.

The market went against the defendant, and at the end of August the plaintiffs asked him either to give delivery of the linseed, or to authorise them to purchase linseed on his behalf. The defendant,

(1) (1904) I. L. R. 28 Bom. 616, (524, 625).

however, did neither the one nor the other, and so the plaintiffs, acting within their rights, discharged their obligation to the thirty-nine buyers by delivering 300 tons, and by making cross contracts, and paying differences as to the balance of the linseed. The result was, that after giving the defendant credit for the 61,000 rupees deposited as margin money, and a sum of Rs. 5,804-2-3 due to him on another account, there was due to the plaintiffs Rs. 90,763-14-6, unless the plea of wagering is an answer to their claim. To determine whether this plea is applicable, it is necessary to consider the real nature of the relations between the parties to the transactions. The case has proceeded in both the Courts on the footing that the plaintiffs were employed by the defendant, and acted as *Pakka Adatias*, and the description in *Bhagwandas v. Kanji* (1) of the customary incidents of such an employment was applicable to the circumstances of this case, though it is to be noted that the defendant was not an up-country constituent.

The plaintiffs, therefore, acted in conformity with the terms of their employment when they made the contracts with the thirty-nine buyers.

And as they made these contracts in exercise of the authority conferred upon them and became liable for their performance, they also became entitled to be indemnified by their employer, the defendant, against the consequences of the acts done by them unless those acts were unlawful. There is no suggestion that the acts of a *Pakka Adatia* as such are unlawful; on the contrary, *Pakhi Adat* dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.

No doubt the contract of a *Pakka Adatia*, as that of anyone else, may be by way of wager; but can it be said that the employment of the plaintiffs by the defendant was of this description?

It has not been shown that there was any bargain or understanding between the parties, either express or implied, that linseed was not to be delivered, nor was it a term, of the employment that the plaintiffs should protect the defendant from liability to make delivery.

It may well be, as suggested in the evidence of Hargopal, that the defendant was a speculator, who never intended to give delivery, and even that the plaintiffs did not expect him to deliver; but that would not convert a contract, otherwise innocent, into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.

No such intention has been proved.

(1) (1905) L. L. R. 30 Bom. 205.

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Under the sales to the thirty-nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as *Pakka Adatias* of the defendant the rise or fall of the market was a matter of no concern to them, except so far as it might enhance the risk of recovering complete indemnity from their employer. Their right was to their commission and to an indemnity against loss as incidents of their employment.

The mere fact that as to the greater part of the linseed there was no delivery, but an adjustment of claims cannot alone vitiate the transactions.

The learned Judges in appeal were evidently impressed by the statement ascribed to the plaintiffs' munim that the delivery of 300 tons was made for the purpose of Court proceedings and by the clause in the contracts forbidding delivery to Messrs. Naranadas Rajaram and Co. Their Lordships, however, attribute no importance to either of these matters. Even if the munim's statement be regarded as proved—a point on which their Lordships are, in the circumstances, far from satisfied—it would mean no more than that the plaintiffs fancied an actual delivery would tend to allay such doubts as the Court might otherwise have as to the reality of the transactions. But this was in no sense inconsistent with this reality. At the same time the clauses forbidding delivery to Messrs. Naranadas Rajaram clearly cannot be regarded as throwing any doubt on the transactions. No such suggestion seems to have been made at the trial in the Court of first instance, and it does not appear to their Lordships to be reasonably susceptible of the significance ascribed to it.

Their Lordships therefore hold there was no ground for setting aside the decree of the Court of first instance, and they will therefore humbly advise His Majesty to restore it and to reverse the decree of the High Court on appeal, ordering instead of it that the appeal to it be dismissed with costs. As the defendant Burjorji has died during the pendency of the appeal, and the present respondent has been appointed at the instance of the appellants to represent him for the purpose of this appeal alone, there will be no order as to the costs of this appeal.

Ashurst, Morris Crisp & Co.—Solicitors for the Appellant.

Respondent did not appear.

J. M. P.

Appeal allowed.

PRESENT :—*Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart, and Sir Lawrence Jenkins.*

• ANANT RAM AND OTHERS

v.

THE COLLECTOR OF ETAH AND OTHERS.

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1917.

October, 29.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.]

Hindu Law—Mitakshara—Mortgage of joint property by a manager who is not the father—Burden of proving necessity—Whether a mortgage of joint property without necessity binds mortgagor's own share.

The mortgage of joint estate made by the manager of a joint family governed by Mitakshara, who is not the father of the other members, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence, it may be assumed, if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof is on the person who claims the benefit of the mortgage.

If the mortgage debt was not incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of such a mortgage: *Narain Prasad v. Sarnam Singh* (1), followed.

When the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent to which necessity has been proved.

A zemindar, manager of a Mitakshara joint family, mortgaged their joint villages for Rs. 3,000 to pay Government revenue. The lender suing on the mortgage, other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1,698 odd were actually paid as revenue of ten of the villages out of the money lent, but no evidence was given as to the disposal of the balance :

Held, that the mortgage was enforceable to the extent of Rs. 1,698 only against the joint villages : and that as regards the balance, not even the mortgagor's own share in these villages was bound.

Ex-parte appeal from a judgment and decree of the Allahabad High Court, dated 11th May, 1911, which varied a decree of the Subordinate Judge of Aligarh, dated the 13th May, 1909. Raja Sheoraj Singh and Maharaj Singh two brothers were members of a Mitakshara joint family. The manager Sheoraj Singh executed a mortgage in favour of the ancestor of the plaintiffs-appellants, having borrowed Rs. 3,000 "in order to pay the Government revenue." The plaintiffs sued to recover the debt. The defence of one of the defendants who was a transferee of some of the

(1) (1917) L. R. 44 J. A. 163 ; 26 C. L. J. 97.

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mortgaged properties was that there was no legal necessity for contracting the debt and that in any case the share of Maharaj Singh who was a minor at the time of the execution of the mortgage was not liable. The Subordinate Judge found for the plaintiffs and made a decree awarding the principal with yearly rests instead of six monthly rests. The contesting defendant (now represented by the Collector of Etah) appealed to the High Court which held that legal necessity was proved to the extent of Rs. 1,698 odd and made a decree accordingly for that amount with six monthly rests. The High Court was of opinion that questions of law of general importance arose in the appeal and therefore certified that the case was a fit one for appeal to His Majesty in Council. The said questions are set out in their Lordships' judgment.

B. Dube, for the Appellants conceded that the questions of law raised before the High Court had been recently decided by the Board against the appellant's contention: Reference was made to *Sahu Ram Chunder v. Bhupnaryan* (1); *Narayan Prasad v. Sarnan Singh* (2); *Banga Chandra Dhur Biswas v. Jagat Kishore Chowdhuri* (3).

On the merits it was submitted that the Subordinate Judge was right in holding that the whole of the mortgage-debt was borrowed for the payment of revenue.

The Respondents did not appear.

The judgment of their Lordships was delivered by

October, 29.

Lord Buckmaster :—The question raised in this appeal is as to the rights of certain mortgagees under and in respect of a mortgage which was dated the 4th September, 1894. That mortgage was executed by one Raja Sheoraj Singh, the manager of certain joint property held by himself and his brother, Maharaj Singh, and governed by the Mitakshara law. The mortgage was for the sum of 3,000 rupees, with interest at the rate of 1 rupee 2 annas per cent. per month, with compound interest and half-yearly rests. The mortgage affects three villages, and on the face of it there is a recital that the money was lent in order that the mortgagor might pay the Government revenue. The original mortgagee is dead, and his representatives instituted the proceedings out of which this appeal has arisen for the purpose of enforcing their rights under the mortgage deed. A considerable number of defences were raised by the

(1) (1917) L. R. 44 I. A. 126; 26 C. L. J. 1.

(2) (1917) L. R. 44 I. A. 163; 26 C. L. J. 97.

(3) (1916) L. R. 43 I. A. 249; 24 C. L. J. 487.

different parties who were made defendants to those proceedings, but for the purpose of the present appeal only one of those defences needs consideration. That defence is this: that the property that was mortgaged, being joint property, a mortgage could only be operative to the extent to which the mortgage-money was needed for the necessities of the joint estate. The learned Judge before whom the case was heard allowed the whole of the original mortgage debt to stand, but reduced the rate of interest. The High Court, to whom an appeal was brought, has allowed the mortgage for part only of the original sum, namely, for the sum of 1,698 rupees 5 annas, and has restored the full rights of interest which the mortgagee possessed under the deed on that sum.

The appeal from that judgment has been brought under an order made by the High Court, who thought that the appeal gave rise to two questions of importance, the first being: "Whether the burden lies upon a mortgagee who takes a mortgage from the manager of a joint Hindu family governed by the Mitakshara law to prove that the debt was incurred for family necessity"; and the second: "Whether, if the debt was not so incurred, the interest of the manager of the family, that is, of the mortgagor, in the mortgaged property could be sold in enforcement of the mortgage." It is to be observed that the grounds upon which the appeal was permitted do not include the question of considering whether, in point of fact, more than the amount allowed by the High Court had in fact been raised by way of necessity; but this point has been argued and considered by their Lordships.

As to the first of these two questions their Lordships entertain no doubt. The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith (see 38, Transfer of Property Act). In either case the burden of proof lies on the person who claims the benefit of the mortgage. There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage made, for example, by a widow who has only a similar limited power of disposition. In the case of *Banga Chandra Dhur Biswas v. Jagat Kishore Chowdhuri* (1), following previous decisions to the

(1) (1916) L. R., 43 I. A. 249 ; 24 C. L. J. 487.

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same effect, it was stated in perfectly clear and unambiguous terms that the burden of proving that such dispositions were lawful rests upon the persons who seek to claim benefits under them. The question, therefore, which the High Court thought needed consideration, so far as the burden of proof is concerned, must be decided against the appellants.

As to the second point, that question, so far as it covers mortgages in the same province as the province from which this appeal has been brought, has also been decided since the judgment of the High Court, adverse to the appellants' contention in a case to which their Lordships' attention was called—*Narain Prasad v. Sarnam Singh* (1).

There remains only the point as to whether in this case the High Court were right in thinking that the mortgagee had only discharged the burden thrown upon him of proving necessity for the deed to the limited extent of the 1,698 rupees. Now the facts with regard to that matter are these: There were three villages that were the subject of the mortgage. The statement in the deed was that the money was needed to pay the Government revenue. What payments were made in respect of that revenue could easily be established by calling the proper witnesses, and, indeed, one such witness was called for the purpose of proving payments in respect of two of the villages, and he showed payments to the amount for which the High Court has allowed the mortgage to stand. The mortgagee cannot allege that the witnesses who could prove the necessity, on the existence of which his security depends, are inaccessible, or cannot now be obtained through lapse of time or for other good reason. The proof could have been and ought to have been laid before the Court by the appellants, on whom the burden rests. That burden they have failed to discharge, and in their Lordships' opinion the High Court was perfectly right in deciding that the security stood to the limited extent only of the necessity proved. They will therefore humbly advise His Majesty that this appeal should be dismissed.

Barrow, Rogers and Nevill—Solicitors for the Appellants.

The Respondents did not appear.

J. M. P.

Appeal dismissed.

(1) (1917) L. R. 44 I A. 163; 26 C. L. J. 97.

PRESENT:—*Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart, and Sir Lawrence Jenkins.*

• C. GANAPATHY MUDALIAR

v.

N. KRISHNAMACHARIAR AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

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November, 12, 13.
December, 14.

Mortgage suit for sale—Decree defective under the Transfer of Property Act, (IV of 1882) S. 88—Sale in execution of such a decree—Confirmation of sale—Mortgagor's right to redeem—Subsequent suit to redeem against the auction-purchaser—Practice—Code of Civil Procedure, (Act XIV of 1882), section 244.

In a mortgage suit for sale of the mortgaged property the decree made did not comply with the provisions of the Transfer of Property Act, section 88, for no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged properties were attached, sold and purchased with the permission of the Court by the mortgagee-decree-holder, and the sale was duly confirmed. The mortgagor subsequently brought the present suit to redeem the mortgage :

Held, that the decree was intended to be made in compliance with the Act, and, whether or not its provisions were complied with, the property and all right, title and interest of the defendant were in fact sold in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made and that decree was not appealed, and that the mortgagor-plaintiff was barred from a right to redeem.

Held, also, that the question now raised could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court executing the decree, and that the present suit was barred by section 244 of the Code of Civil Procedure, 1882 : *Prasanno Kumar Sanjal v. Kali Das Sanjal* (1) followed.

Appeal from a judgment and decree of the Madras High Court (Miller and Tyabji, JJ.), dated 17th February, 1914, affirming a judgment and decree of the District Judge of North Arcot, dated the 9th February, 1910. One Kumaraswami Mudaliar, a Hindu governed by the Mitakshara law, executed three mortgages of ancestral property: (1) in 1876 in favour of Varadappa, (2) in 1879 in favour of a vakil named Vijayaraghavachariar and, (3) on the 10th May, 1881 in favour of Narasingha. Subsequently two sons were born to the mortgagor, namely the plaintiff appellant and his brother since deceased, in 1881 and 1882 respectively. The first and third mortgages were assigned to the said vakil; subsequently the vakil sued on the third mortgage for sale of the mortgaged property, and made the father and his two sons defendants. At the trial the

(1) (1892) L. R. 19 I. A. 166; I. L. R. 19 Calc. 683.

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father objected that he was not the guardian of his two sons but the Judge overruled the objection and made a decree, dated 15th April, 1886 for sale of the mortgaged property. On the 16th August 1886, the decree-holder applied for execution by attachment and sale of the mortgaged property. On the 28th September, 1886, Govindaraju, an uncle of the minors, applied to be appointed guardian of the minors and for an order setting aside the decree, dated 15th April, 1886, on the ground that the minors were not represented. The Court granted the application and ordered a new trial. But Govindaraju did not file any written statement and the case was heard *ex parte* and the Court made a decree, dated 15th November, 1886, against the defendants for sale of the mortgaged property. On further proceedings under the said application of the 16th August, 1886, the properties were subsequently sold in execution and were purchased by the decree-holder with the leave of the Court. The plaintiff's father died in 1894 and in 1904 the plaintiff obtained the release of his brother's rights and instituted the present suit in 1907 to redeem all the three mortgages in suit. The trial Judge held that the plaintiff was properly represented and was bound by the decree and by the execution proceedings and that the suit was barred by section 244 of the Code of Civil Procedure, 1882. Miller, J. held that the plaintiff was duly represented in the execution proceedings and that the sale was binding on the plaintiff, and Tyabji, J. took the same view. Hence this appeal.

Sir W. Garth for the Appellant submitted that the sale had really taken place in execution of the decree, dated 15th April, 1886. Attachment was made under an application, dated 14th August, 1886, and in the subsequent proceedings which resulted in the sale the minors were described as under the protection of their father. The sons were not properly represented on the record and the sale was therefore not binding on the plaintiff. Reliance was placed on the following:—*Khizarajmal v. Daim* (1); *Musammatt Rashi-un-nisa v. Muhammad Ismail Khan* (2). In any case the right to redeem had not been extinguished by the sale because the necessary decree for the sale and an order absolute for sale were not made by the Court as required by the provisions of the Transfer of Property Act, sections 58, 68, 85, 86, 88, 89. There is no authority for the proposition that even though the provisions of that Act are not complied with, the right to redeem is lost by a sale under such a decree as in this case. The legislature has provided that the

(1) (1904) L. R. 32 I. A. 23 (33); I. L. R. 32 Calc. 296; 1 C. L. J. 584.

(2) (1909) L. R. 36 I. A. 168; I. L. R. 31 All. 572; 10 C. L. J. 318.

mortgagor's right to redeem is not lost unless certain steps are taken under that Act. Reference was made to :—*Mallikarjunadu v. Lingamurti* (1).

Sir Erle Richards, K. C. and Brown for the Mortgagee (Respondent):—A sale of ancestral property in execution of a decree conveying the right, title and interest of the father of a joint family is binding on the sons : *Sripat Singh v. Tagore* (2). The minors were properly represented and the second decree of the 15th November, was substituted for the first decree on the 15th April. The attachment and sale really took place under the second decree. Govindaraju was fully aware of the pending sale. In any case the plaintiff was a party to the retrial of the suit, and is bound by the decree and the execution proceedings therein. A separate suit is barred by section 244 of the Code of Civil Procedure, 1882: *Prosunno Coomar v. Kali Das* (3), is conclusive on the point. The questions now raised could and ought to have been raised before the sale was confirmed under that section.

Sir W. Garth in reply:—The sale really took place under an attachment made under the first decree. In order to see what was sold at a judicial sale the Court must look at the proceedings which culminated in the sale: *Thakur Barmha v. Jibanram* (4).

Section 244 of the Code has no application because the minors were not parties to the execution proceedings and were not properly represented therein.

The judgment of their Lordships was delivered by

Sir John Edge.—This is an appeal from a decree of the High Court at Madras, dated the 17th February, 1914, which affirmed a decree, dated the 9th February, 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

The suit was brought in the Court of the District Judge of North Arcot on the 16th November, 1907, to redeem three mortgages dated respectively the 12th December, 1876; the 7th January, 1879; and the 10th May, 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, were born. The mortgage of the 7th January, 1879, was in favour of N. Vijayaragavachariar, a vakil, to

(1) (1902) I. L. R. 25 Mad. 244.

(2) (1916) L. R. 44 I. A. 1; 25 C. L. J. 220.

(3) (1892) L. R. 19 I. A. 166; I. L. R. 19 Calc. 683.

(4) (1913) L. R. 41 I. A. 38 (43); I. L. R. 41 Calc. 590; 19 C. L. J. 161.

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whom their Lordships will refer as the vakil. The mortgages of the 12th December, 1876, and the 10th May, 1881, vested by assignment in the vakil. The plaintiff in this suit was born in September 1881; his brother was born in May 1882.

On the 19th March, 1886, the vakil brought in the District Court of North Arcot, a suit for sale on the mortgage of the 10th May, 1881, against the plaintiff's father, the plaintiff, aged 4 years, and his brother, aged 3 years, the brothers being described as "maintained by the first defendant," who was their father. The suit was entered on the files of the Court as original suit No. 5 of 1886. Their father, who had not been appointed as their guardian for the suit, objected that he was not their guardian, but the District Judge overruled the objection, and on the 15th April, 1886, made a decree in the following terms:—

"It is ordered that plaintiff do recover 10,891 rupees, together with further interest at 6 per cent. per annum from date of plaint to date of payment and costs, to be recovered from the first defendant personally, and by sale of the mortgaged property."

That decree was doubtless intended to be in compliance with the provisions of "The Transfer of Property Act, 1882," but it did not comply with those provisions.

On the 16th August, 1886, the vakil presented to the District Court his petition, under section 230 of the Code of Civil Procedure, 1882, for execution of the decree of the 15th April, 1886. The petition was entered on the files of the Court as "Execution Petition No. 57 of 1886 in O.S. (original suit) No. 5 of 1886," and by it the petitioner prayed "that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immovable property set out in the schedule herewith filed." In that petition the present plaintiff and his brother were described as minors, defendants "by their guardian the first defendant." In the schedule the vakil disclosed the fact that there existed the mortgages of the 12th December, 1876, and the 7th January, 1879. On the 18th August, 1886, the warrant of attachment was issued, and on the 13th September, 1886, a notice of sale was issued.

On the 28th September, 1886, one Govindaraju Mudali, who was a maternal uncle of the present plaintiff and his brother, applied to the District Court to be appointed their guardian and to have the decree of the 15th April, 1886, set aside, on the ground that their father was not their proper guardian. Govindaraju Mudali apparently contended in support of his application that the debt in respect of which the mortgage of the 10th May, 1881, had been

given was not one which the minors or the properties were liable to discharge. On the 10th November, 1886, the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of the 15th April, 1886, as against them. Govindaraju was ordered to put in a written statement on the 15th November, 1886, on behalf of the minors, but he failed to do so and did not appear. On the 15th November, 1886, the District Judge made a decree that the plaintiff (the vakil) "do recover 10,891 rupees, together with further interest at 6 per cent. per annum from date of plaint to date of payment, and costs, to be recovered from the first defendant personally and by sale of the mortgaged property." That decree did not comply with the provisions of "The Transfer of Property Act, 1882," but it was not appealed and it became final. It was obviously intended to be in supersession of the decree of the 15th April, 1886, and must be regarded as having superseded that decree.

On the 24th January, 1887, the Court of the District Judge caused a proclamation of the intended sale to be made under section 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in original suit No. 5 of 1886, application No. 57 of 1886, and proclaimed that—"Whereas the immovable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit. Take notice that if the amounts specified below be not paid into this Court, or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this Court on the 19th September, 1887, and that in that sale the right, title, and interest possessed by the above defendants alone in respect of that property shall be sold."

So far as appears from the documents in the record, the only attachment which had issued was that of the 18th August, 1886.

It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on the 20th December, 1886, in original suit No. 5 of 1886. What the order appealed from was does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of, Govindaraju Mudali, at some time between the 24th January, 1887, and the 2nd March, 1887, applied to the High Court for an order to stay the sale of the property attached in

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execution of the decree of the District Court of North Arcot in Original Suit No 5 of 1886. That application was dismissed by the High Court on the 1st August, 1887.

On the 28th February, 1887, the District Court made an order permitting the vakil to bid at the sale. On the 19th September, 1887, the immovable properties in question were sold, subject to incumbrances, by public auction, and the vakil became the purchaser.

The sale was confirmed by the District Judge on the 13th December, 1887, and he, on the 1st February, 1888, gave the sale certificate under his hand and the seal of the Court. The vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the vakil. The father of the present plaintiff died in May, 1894. The plaintiff's brother died in September, 1904. The present plaintiff, his brother and their father, had constituted a Hindu joint family.

On behalf of the appellant here it was contended that the sale took place in execution of the decree of the 15th April, 1886, and not in execution of the decree of the 15th November, 1886, and that under such circumstances only the right, title, and interest of the father were sold. That contention is based on the fact that the attachment of the 16th August, 1886, was made under the decree of the 15th April, 1886. The sale must have been under the decree of the 15th November, 1886. No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of the 24th January, 1887, was made subsequent to the decree for sale of the 15th November, 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title, and interest in the property of the defendants to the suit of the 19th March, 1886, and the certificate of sale shows that the right, title, and interest in the property of the defendants to that suit were sold to the vakil. The present plaintiff and his brother were defendants to that suit, under the guardianship of Govindaraju Mudali, at the time when the decree of the 15th November, 1886, was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf on the appellant here that as the provisions of "The Transfer of Property Act, 1882," were not complied with in the suit for sale of the 19th March, 1886, and as

no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due, the defendants to the suit of the 19th March, 1886, were not debarred from a right to redeem. It appears to their Lordships that the answer to that contention is that whether or not the provisions of "The Transfer of Property Act, 1882," were complied with, the property and all right, title, and interest of those defendants in it were in fact sold to the vakil in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed.

By section 244 of the Code of Civil Procedure, 1882, it was enacted that :— •

"244. The following questions shall be determined by order of the Court executing a decree and not by a separate suit (namely) :—

"(c). Any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof."

This Board decided in *Prosunno Coomar Sanyal and another v. Kali Das Sanyal and others* (1), that section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction-purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction-purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree of the 15th November, 1886.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed.

The appellant must pay the costs of this appeal.

Douglas Grant :—Solicitor for the Appellant.

Chapman Walker and *Shepherd* :—Solicitors for the Respondents.

J. M. P.

Appeal dismissed.

(1) (1892) L. R. 19 I. A. 166.

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APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Walmsley.

SECRETARY OF STATE FOR INDIA IN COUNCIL.

v.

GANGADHAR NANDA.*

*Limitation—Bengal Tenancy Act (VIII of 1885), Sec. 104 H., suit under—
Period, extension of—Limitation Act (IX of 1908), Sec. 15 (2)—Bengal
Tenancy Act (VIII of 1885), Secs. 184, 185.*

Section 15, sub-section (2) of the Limitation Act, does not extend the period of six months mentioned in section 104H sub-section (2) of the Bengal Tenancy Act.

Section 15 sub-section (2) of the Limitation Act, which is made applicable to suits, appeals and applications mentioned in the third schedule annexed to the Bengal Tenancy Act, by virtue of section 185, sub-section (2) does not apply to suits instituted under section 104H of the Bengal Tenancy Act, which are not mentioned in the third schedule: *Kadhasyam v. Dinobundhoo* (1) referred to: *Dropadi v. Hira Lal* (2) distinguished.

Appeal by the Defendant.

Suit for declaration under section 104H of the Bengal Tenancy Act.

The material facts and arguments appear from the judgment.

Babu Ram Charan Mitra for the Appellant.

Mr B Chakrabarti, Babus Sib Chunder Palit, Kshirod Narayan Bhuiya and Dharendra Krishna Roy for the Respondent

C. A. V.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the Secretary of State for India in Council against a decree in a suit instituted by the respondent on the 16th May, 1910, under section 104H of the Bengal Tenancy Act. The lands in suit are comprised in three villages—Dakhin Baraj, Uttar Dighe and Dhair Kukusria. The settlement roll, to which exception was taken by the plaintiff, was published, in the case of the first village, on the 2nd June, 1910, and in the case of the other two villages, on the 17th June, 1910. As regards the

* Appeal from the Original Decree No. 405 of 1914, against the decision of Babu Achinta Nath Mitra, Subordinate Judge of Midnapur, dated the 26th March, 1913.

(1) (1913) 18 C. L. J. 533; 18 C. W. N. 31.

(2) (1912) I. L. R. 34 All. 496; 10 A. L. J. 3.

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claim in respect of the first village, objection is taken that the suit is barred under sub-section (2) of section 104H which provides that a suit under sub-section (1) must be instituted within 6 months of the date of the certificate of final publication of the record-of-rights. This objection does not apply to the second and third village., and for the reasons assigned in our judgment in *Secretary of State v. Digambar Nanda* (1). [Appeal from original decree, No. 252 of 1913] the case must be remitted to the Subordinate Judge for investigation, whether the plaintiff is an occupancy raiyat or a non-occupancy raiyat in respect of the lands comprised in these two villages and for ascertainment of fair and equitable rent payable in respect thereof. *In respect of the lands of the village Dakhin Baraj, however, the question of limitation requires careful consideration.

The record-of-right was finally published on the 2nd June, 1910. The suit was instituted on the 1st December, 1910, after the expiry of the period of six months prescribed by section 104H, sub-section (2). The plaintiff claims the benefit of section 15 sub-section (2) of the Indian Limitation Act which provides that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force the period of such notice shall be excluded. In the case before us, the plaintiff served a notice as required by section 80 of the Code of 1908 which provides that no suit shall be instituted against the Secretary of State for India in Council until after the expiration of two months next after notice in writing has been delivered or left at the office of a Secretary to the Local Government or the Collector of the District. Consequently if section 15 sub-section (2) of the Indian Limitation Act is held applicable to the case before us, it is plain that the suit is not open to objection on the ground of limitation. Now the term "prescribed" as used in sub-section (2) of section 15, read with section 3 obviously means "prescribed by the first schedule to the Indian Limitation Act"; consequently, this provision cannot, by its own force, extend the period of six months mentioned in section 104H, sub-section (2) of the Bengal Tenancy Act. The plaintiff respondent has thus been forced to argue that section 29 of the Indian Limitation Act and sections 184 and 185 of the Bengal Tenancy Act make section 15 sub-section (2) of the Indian Limitation Act applicable to suits under section 104 H of the Bengal Tenancy Act. In our opinion there is no force in this contention.

Section 29 (1) (b) provides that nothing in the Indian Limitation

(1) (1917) 27 C. L. J. 334.

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Act shall affect or alter any period of limitation specially prescribed for any suit appeal or application by any special law or local law now or hereinafter in force in British India. Section 184 of the Bengal Tenancy Act provides that the suits, appeals and applications specified in the third schedule annexed to the Act shall be instituted within the time prescribed in that schedule for them respectively, and every such suit or appeal instituted or application made after the period of limitation so prescribed shall be dismissed, although limitation has not been pleaded. Section 185, sub-section (1) then lays down that sections 7, 8 and 9 of the Indian Limitation Act 1877, shall not apply to suits or applications mentioned in section 184. Section 185 sub-section (2) next provides that subject to the provisions of Chapter XVI of the Bengal Tenancy Act, the provisions of the Indian Limitation Act, 1877, shall apply to all suits, appeals and applications mentioned in section 184; that is, suits, appeals, and applications specified in the third schedule. It is plain beyond reasonable controversy that section 15 (2) of the Indian Limitation Act, which is made applicable to suits, appeals and applications mentioned in the third schedule annexed to the Bengal Tenancy Act, by virtue of section 185 sub-section (2), cannot possibly apply to suits instituted under section 104 H which are not mentioned in the third schedule. This view is supported by the decision in *Radhasyam v. Dinobundhoo* (1), where it was ruled that section 18 of the Indian Limitation Act does not apply to an application under section 174, Bengal Tenancy Act. Much stress, however, has been laid on the decision of a Full Bench of the Allahabad High Court in *Dropadi v. Hira Lal* (2) where a question arose as to the applicability of the provisions of the Indian Limitation Act to proceedings in insolvency. That case is clearly distinguishable; but it may be observed that the decision has not always been regarded with favour: *Thakur Prasad v. Panno Lal* (3); *Munguluri v. Singumahanti* (4); *Abu Backer Sahib v. Secretary, of State for India* (5). There is also no analogy between the case before us and the decisions in *Sharoop Dass Mondal v. Juggessur Roy Chowdhry* (6); *Dulhin Mathura Das v. Bansidhar Singh* (7); and

(1) (1913) 18 C. L. J. 533; 18 C. W. N. 31.

(2) (1912) I. L. R. 34 All. 496; 10 A. L. J. 3.

(3) (1913) I. L. R. 35 All. 410; 11 A. L. J. 603.

(4) (1915) 18 M. L. T. 200.

(5) (1909) I. L. R. 34 Mad. 505; 20 M. L. J. 283.

(6) (1899) I. L. R. 26 Calc. 564; 3 C. W. N. 464.

(7) (1911) 16 C. W. N. 904.

Srinivasa Ayyangar v. Secretary of State (1). A question of the description now before us must be determined by a reference to the terms of the special statute, and on a plain reading of the provisions of section 185, Bengal Tenancy Act, taken along with section 15 subsection (2) of the Indian Limitation Act, we feel no doubt whatever that section 15(2) cannot possibly be applied to extend the period of six months provided for the institution of suits under section 104H of the Bengal Tenancy Act. In our opinion, the suit is barred by limitation in respect of the lands comprised in village Dakhin Buroji.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. The suit will stand dismissed in respect of the lands in village Dakhin Baroji. With regard to the lands of Utter Deegha and Dhai Kukuria, the decree of this Court will declare that the plaintiff is a raiyat and not a tenure-holder and the case will be remitted to the Subordinate Judge to determine whether the plaintiff is an occupancy raiyat or a non-occupancy raiyat and then to ascertain the amount of fair and equitable rent payable by him according to his status. Each party will pay his own costs both here and in the Court below up to the present stage. The costs after remand will abide the result.

A. T. M.

*Appeal allowed in part: Cases
remanded as regards part.*

(1) (1912) I. L. R. 38 Mad. 92 ; 24 M. L. J. 41.

APPELLATE CRIMINAL.

Before Mr. Justice Richardson and Mr. Justice Beachcroft.

ELAHI BAKSHA KAZI

v.

KING-EMPEROR.*

Evidence, admissibility of—Deposition not read over to witness—Evidence Act (I of 1872), Secs. 80, 91—Civil Procedure Code (Act V of 1908) O. 18 Rr. 5, 6.

A provision requiring a deposition to be read over to a witness is in its nature directory and if it were not complied with in a particular case, the deposition while it may lose the benefit of section 80 of the Evidence Act, may be proved in some other way.

*Criminal Appeal No. 713 of 1917, against the conviction and sentence passed by S. E. Stenton Esq., Additional Sessions Judge of Dacca, dated the 26th September, 1917.

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Emperor v. Mayadeb (1) doubted.

Per Bechcroft J. : The object of the provision in Order 18 of rule 5 of the Code of Civil Procedure requiring a deposition to be read over to a witness, is to ensure accuracy.

Appeal under section 410 of the Code of Criminal Procedure.

The appellant was charged under section 467 read with section 109 and section 471 read with section 109 of the Penal Code. He was sentenced for each offence to six years' rigorous imprisonment, the sentences to run concurrently.

The material facts appear from the judgment.

Babus Dasarathi Sanyal and *Upendra Lal Roy* for the Appellant.

Mr. Monnier for the Crown.

The judgments of the Court were as follows :

January, 29.

Richardson, J.—The appellant was tried before the Additional Sessions Judge of Dacca and a Jury on charges of abetment of forgery and abetment of the use of forged document framed under sections 467, and 471 Indian Penal Code, read in each case with section 109 of the same Code. The Jury returned a unanimous verdict of guilty on both the charges and the learned Sessions Judge accepted the verdict and sentenced the appellant for each offence to six years' rigorous imprisonment, directing, however, that the sentences should run concurrently. The charges relate to a series of seven bonds. The case for the prosecution is that these seven bonds were forged by or by the connivance of one Sridam in order to take the place of seven genuine bonds. It appears that Sridam and his brothers had borrowed money from Nakari Gope, the father of Mohim Chandra Gope, the complainant in the present case. It is alleged that on the 3rd Aswin, 1316 (September, 1909) Sridam executed seven bonds in favour of Nakari on which Nakari's son Mohim, Nakari himself having in the meantime died, instituted a suit on the 15th August, 1913. The suit was against Sridam and his brothers. On the 18th November, 1913, the latter filed their written statement and with it they filed the bonds which are alleged to be forged. The endorsements on the back of those bonds purporting to show that the bonds were satisfied by payment on the 31st Chaitra, 1319 are also said to be forgeries. Mohim's suit was tried by the Munsiff who found that the bonds produced by the plaintiff were genuine and that the bonds produced by the defendants with the endorsements were forged. After that decision Mohim presented an application for leave to prosecute Sridam and

(1) (1881) L. L. R. 6 Calc. 762.

his brothers for forgery and other offences. The learned Munsiff who tried the suit refused to grant the sanction. Mohim then moved the District Judge who, under section 476, Criminal Procedure Code, directed that Sridam and his brothers should be prosecuted for certain offence including forgery. A motion against that order was made to the High Court but the Court refused to entertain it. Then followed further proceedings the result of which was that Sridam and his brothers were tried for forgery and that Sridam was convicted of that offence. The order of the District Judge under section 476, Criminal Procedure Code, also directed the prosecution of the present appellant Elahi Baksha Kazi. The latter was tried for perjury and was acquitted of that offence. He was then placed on his trial on the charges of which he has now been convicted.

The learned pleader for the appellant has contended before us that the trial in the Court below is vitiated by the reception of evidence which is not admissible under the law. The contention relates to the deposition of the appellant in the suit brought by Mohim and the point taken is that the formalities required by rules 5 and 6 of order 18, Civil Procedure Code, were not observed. It is not disputed that the evidence was given on oath. But it is said that after the deposition had been written down by the Munsiff it was not read over to the witness as rule 5 requires or at any rate that it was not read to the witness in the presence of the Judge. Upon that it is argued that the deposition is not legally a deposition at all and that the Judge was wrong in allowing it to go to the Jury. In support of the contention reference is made to the cases of *Empress v. Mayadeb Gossami* (1) and *Kamat Chinathan Chetty v. Emperor* (2). If as a matter of fact the appellant's deposition was not interpreted and read over to him in the prescribed manner, the cases cited support the contention advanced, unless the rule laid down is to be confined, as it seems to have been in the past, to prosecutions for perjury. Our attention, however, has also been drawn to the case of *Bogra v. Emperor* (3), where a different note, and as it seems to me, the true note, is struck. The cases of *Emperor v. Mayadeb Gossami* (1) and *Kamat Chinathan Chetty v. Emperor* (2) have been followed in other cases, for instance, *Empress v. Jogendra Nath Ghose* (4). Speaking for myself, however, with great respect I am not sure that I clearly understand the principle of those decisions. Under section 80 of the Indian Evidence Act

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(1) (1881) I. L. R. 6 Calc. 762.

(2) (1904) I. L. R. 28 Mad. 308.

(3) (1910) I. L. R. 34 Mad. 141.

(4) (1914) I. L. R. 42 Calc. 240.

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the deposition of a witness taken in accordance with law and purporting to be signed by a Judge or Magistrate proves itself. No other proof is required than the production of the deposition. I should have thought that a provision requiring a deposition to be read over to a witness was in its nature directory, and that if it were not complied with in a particular case, the deposition while it might perhaps lose the benefit of section 80 of the Evidence Act, might still be proved in some other way. No doubt section 91 of the same Act says that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself. But even if a deposition comes within that enactment, no question arises of proving the contents of a deposition except by the production of the deposition itself: The question is how is the deposition to be proved. There is no provision in the Code of Civil Procedure which expressly precludes a deposition from being received in evidence unless it has been read over to the witness in the presence of the Judge. In the case of a document which requires registration but is not registered, it is inadmissible in evidence not by reason of the provisions of section 91 of the Evidence Act, but by reason of the express provisions on the subject contained in the Registration Act. As at present advised I can see no reason why even in a prosecution for perjury failure to comply with the provisions of rules 5 and 6 of order XVIII should render a deposition entirely inadmissible in evidence, or why, if section 80 cannot be called in aid, the deposition should not be proved, for instance, by the Judge who took it down, or by the admission of the deponent. If it can be proved in some such way, section 91 will have no application. But it is not necessary to determine this question in the present case because the learned pleader for the appellant has not been able to satisfy me on the record as it stands that the deposition of the appellant was not in fact read over to him as the Code requires. The Munsiff was put in the witness-box for the prosecution. The pleader for Sridam's brother was also examined. Neither was asked in cross-examination whether the appellant's deposition was read over to him after it had been recorded by the Court. The deposition bears the signature of the Munsiff. It also bears the signature in Bengali of the appellant. The presence of the appellant's signature at the end of the deposition certainly supports the inference that the document was read over to him. There is nothing in the record to show that this was not done. The signature was presumably affixed in token that the deposition had been cor-

rectly recorded. No doubt the words which sometimes appear at the end of a deposition "read over and admitted to be correct" do not appear in the present case before the appellant's signature. But the Code does not require that those words should be inserted. From my experience of the practice of the Courts below I may be more disposed to doubt whether the reading over of the deposition took place in the presence of the Munsiff. But it still remains that there is no suggestion in the evidence that the law was not complied with. In my opinion, as the record stands, there is no ground for the contention that this deposition was not admissible in evidence. The point, I may add, was not taken in the Sessions Court.

As to the substance of the matter, there is no shadow of a suggestion that the appellant did not say what he is recorded as having said. The objection taken to the trial is an entirely technical one, and it is conceded that apart from this technical objection, the propriety of the appellant's conviction cannot be contested. In view of the charge of the learned sessions Judge there appears to be no doubt and in fact no dispute that the appellant was the writer of the documents which have since been found to be forged documents and if his deposition was, as I hold, properly received in evidence, the Jury had ample grounds for finding that the part which he took was a fraudulent and dishonest part.

The learned pleader for the appellant has asked us to use our powers under section 428, Criminal Procedure Code, and to examine or to direct the examination of the peshkar of the Munsiff's Court at the time when the appellant's deposition was recorded in the civil Suit. In support of that application the learned pleader has filed a copy of the deposition given by the peshkar in the course of the trial for perjury. I have read that deposition and come to the conclusion that no useful purpose would be served by directing additional evidence to be taken at this late stage.

In the result, I would affirm the conviction. As regards sentence I think that 4 years' rigorous imprisonment would sufficiently meet the ends of justice. I would, therefore, reduce the sentence from 6 years to 4 years rigorous imprisonment under each charge and maintain the order that the sentences are to run concurrently. With this modification, the appeal should be dismissed.

Beachcroft, J.—I agree. I have always felt doubt as to the correctness of the decision in the case of *Emperor v. Mayadeb Gosami* (1) and take this opportunity of endorsing the opinion expressed

(1) (1881) I. L. R. 6 Cal. 762.

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by my learned brother on the point decided in that and other similar cases.

Section 91 of the Evidence Act is based on the principle that the only proper evidence of the contents of a document is the document itself. And the object of the provision in order 18, rule 5, Code of Civil Procedure, requiring a deposition to be read over to a witness is to ensure accuracy. I confess I do not see why, on principle a Court should be precluded from ascertaining what is in a document, from the document itself, merely because the contents of the document may not in fact be correct. Failure to take the necessary precautions to ensure accuracy may create doubts as to whether the record correctly represents what the witness said, but in my opinion it cannot affect the admissibility of the document in evidence if the making of the document is otherwise proved.

A. T. M.

Conviction affirmed: Sentence reduced.

CRIMINAL REVISION.

*Before Mr. Justice Tainon and Sir Syed Shamsul Huda, Knight,
Judge.*

RASHU KABIRAJ

v.

KING-EMPEROR.*

CRIMINAL

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June, 29.
July, 10.

*Security for good behaviour—Criminal Procedure Code (Act V of 1898), Secs. 109
Cls. (a) and (b), 118.*

The petitioner, who was by profession a kabiraj and a dealer in cocoons was found at about midnight in a lane in a town in association with two others who had in their possession house-breaking implements. On being discovered he fled and when arrested he remained silent. The explanation subsequently offered to the Magistrate of his presence at the time and place in question was found to be false:

Held, that the facts did not bring the petitioner within either of clause (a) or (b) of section 109 of the Code of Criminal Procedure.

Per Shamsul Huda, J.: Clause (a) of section 109 of the Code of Criminal Procedure refers to a continuous act and does not apply to a case where there is

* Criminal Revision No. 674 of 1917, against the order of F. W. Robertson, Esq., District Magistrate of Murshidabad, dated the 21st May, 1917, affirming that of Babu L. B. Das, Sub-divisional officer of Jangipore, dated the 31st March, 1917.

a momentary effort at concealment to avoid detection or arrest. It does not apply to the case of a person brought under arrest.

Application under section 435 of the Code of Criminal Procedure.

The petitioner was directed under section 118 read with section 109 of the Code of Criminal Procedure to execute a bond for Rs. 500 with three sureties of Rs. 500 each, to be of good behaviour for one year or in default to undergo rigorous imprisonment for that period.

The facts appear from the judgment.

Babus Manmatha Nath Mukherjee and *Charu Chandra Mitra* for the Petitioner.

Mr. Camell for the Crown.

C. A. V.

The judgments of the Court were as follows :

TEURON, J.—In this case the petitioner has been required to give security for his good behaviour under the provisions of section 118 read with section 109 of the Criminal Procedure Code.

The facts found are that on the night of the 28th February last, the petitioner who is by profession a Kabiraj and a dealer in cocoons was found at about midnight in a lane in the town of Raghunathgunge in association with two others who had in their possession house-breaking implements, that on being discovered he fled, that when arrested he remained silent, and that the explanation subsequently offered to the Magistrate of his presence at the time and place in question is false.

The Magistrate has therefore held that the petitioner was concealing himself with the object presumably of committing the offence of house-breaking.

In the application we are invited to set aside the order against which the Rule is directed on the ground that the facts found do not bring the petitioner within the provisions of either clause (a) on which the Magistrate has relied or of clause (b) of section 109.

With regard to clause (a) it is urged that the petitioner's presence or residence within the Magistrate's jurisdiction was well known, that there was no attempt to conceal the same, and that the petitioner's attempt to conceal his presence at a particular spot at a particular time (even if it were with the object of assisting in the commission of house-breaking) does not bring him within the mischief of the clause.

Similarly with regard to clause (b) it is urged that inasmuch as his name, residence, description, business and professions are

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known and his possession of means has been found he has given a satisfactory account of himself, within the meaning of clause (b) and that it is not necessary that he should be able to give a satisfactory explanation of what he was doing at a particular place at a particular time.

It is further urged that inasmuch as the Magistrate has proceeded under and relied on clause (a) the order cannot be supported in this Court under clause (b). Inasmuch as the petitioner had a full opportunity of meeting the facts alleged against him, this last contention, we think, cannot be sustained but in view of the conclusion at which we have arrived it need not be discussed at length.

In support of the two main contentions we have been referred to the case, *Sharif Ahmad v. King-Emperor* (1), while the Deputy Legal Remembrancer appearing for the crown has cited, *Satis v. Emperor* (2).

The case last cited was that of a young man found associating with political conspirators in a district in which he was a stranger and the decision therefore on the facts of the case is not opposed to the view taken in the two cases first mentioned. On the whole though speaking for myself with some hesitation we have arrived at the conclusion that the facts found do not bring the petitioner within either clause of section 109 of the Code and in further support of this view we may refer to the case of *Reg v. Bhunja* (Ratanlal p. 3) decided in Bombay in 1872, and also to the provisions of the Calcutta Police Act, section 32. That section appears to be based on and largely to reproduce the provisions of the Vagrancy Act in respect of suspected persons. It would doubtless cover a case such as the present but the language therein used by the Legislature is very different from that used in section 109 of the Criminal Procedure Code.

In the result we make this Rule absolute and set aside the order complained of. The petitioner will now be set at liberty.

Shamsul Huda, J.—I would like to add that in my opinion clause (a) of section 109, Criminal Procedure Code, refers to a continuous act and does not therefore apply to a case like the present where there is a momentary effort at concealment to avoid detection or arrest. I also think that the provisions of clause (a) cannot apply to the case of a person brought under arrest, as the accused was, for it cannot be said of such a person that he is taking precautions to conceal his presence.

A. T. M.

Rule made absolute.

{1} (1911) 8 A. L. J. 1097.

{2} (1912) A. L. R. 39 Calc. 456.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr.**Justice Beachcroft.*

GADADHAR GHOSE

v.

MIDNAPORE ZEMINDARY CO.*

Estoppel—Non-transferable holding—Sale in execution of rent decree—Application to set aside sale—Civil Procedure Code (Act XIV of 1882), Sec. 310A—Deposit by purchaser at private sale—Withdrawal of money by landlord.

On the 25th April, 1903, the landlord in execution of a decree for arrears of rent against the recorded tenant purchased a non-transferable holding. On the 25th May, 1913, the second defendant made a deposit under section 310A of the Code of Civil Procedure of 1882, with a view to the cancellation of the sale, alleging that he had purchased the holding from the admitted tenant on the 4th September, 1900. The Court directed that the decree-holder auction-purchaser be called upon to show cause why the deposit should not be accepted. The sale was soon after set aside and on the 29th May, 1903, an application was made on behalf of the decree-holder for leave to withdraw the amount in deposit. The application was granted and the money was paid out in due course :

Held, that the landlord, the decree-holder and auction-purchaser, could not be permitted to urge that the sale to the defendant was inoperative.

Appeal by the Defendant.

Suit for recovery of possession of land on declaration of title.

The material facts and arguments appear from the judgment.

Babus Biraj Mohan Majumdar, Mohini Mohan Chatterjee and Sures Chunder Das for the Appellant.

Mr. U. N. Sen Gupta and *Babu Probodh Kumar Das* for the Respondent.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the first defendant in a suit for recovery of possession of land on declaration of title. The case for the plaintiffs is that the disputed land constituted the non-transferable holding of Arun Chandra Biswas and Hridoy Nath Biswas and that the present defendants are in occupation on allegation of purchase which has conferred upon them no valid title as against the plaintiffs. The Court of first instance dismissed the suit; on appeal, that decision has been reversed by the Subordinate Judge.

* Appeal from Appellate Decree No. 1993 of 1915, against the decree of G. B. Mumford Esq., District Judge of Midnapore, dated the 3rd May, 1915, reversing that of Babu Amrita Lal Mookerjee, Munsiff of Midnapore, dated the 22nd August, 1914.

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The question in controversy between the parties is as to the effect of a deposit made by the second defendant under section 310A of the Code of 1882, which was subsequently withdrawn by the plaintiffs. On the 25th April 1903, the landlords, in execution of a decree for arrears of rent against the recorded tenant purchased this property. On the 25th May 1903, the second defendant made a deposit under section 310A of the Code of 1882, with a view to the cancellation of the sale. He alleged that he had purchased the property from the admitted tenant on the 4th September 1900, and that as his immovable property had been sold, he was competent to make a deposit under section 310A. The Court directed that the decree-holders auction-purchasers be called upon to show cause why the deposit should not be accepted and the sale set aside. Whether notice of this order was or was not served upon the pleader for the decree-holders is not clear on the face of the record, but, on the following day, the sale was set aside. Three days later, on the 29th May 1903, an application was made on behalf of the decree-holders for leave to withdraw the amount in deposit. The application was granted and the money was paid out in due course. The plaintiffs instituted this suit on the 10th February 1914, for declaration that the defendants had not acquired a good title by their purchase of the 4th September, 1900. The question thus arises, whether the plaintiffs are competent to succeed upon this allegation. The appellant has argued that on the principle of the decisions in *Thomas Barclay v. Syed Hossein Ali* (1) and *Ahmed Ali v. Roshan Ali* (2), the plaintiffs cannot possibly succeed. We are of opinion that this contention is well-founded and must prevail.

The second defendant, at the time of the application under section 310A, asserted his purchase and the conveyance of the 4th September 1900, was filed in Court. The decree-holders auction-purchasers were then in a position to challenge his title to make an application under section 310A, which can be utilised only by a person whose immovable property had been sold. The then applicant alleged that his property had been sold on the 25th April 1903, at the instance of the decree-holders; the latter might and should have contended that the application was groundless, that what had been sold was not the property of the applicant, that he had not acquired a good title therein by his purchase of a non-transferable holding, and that the land was the property of the recorded tenant when the sale was held. Such objection should have been pressed before the sale was actually cancelled, if notice of the deposit was duly

(1) (1907) 6 C. L. J. 601.

(2) (1911) 9 I. C. 619.

given to the decree-holders. But whether such notice was or was not served, it is plain that the decree-holders became aware of the order for cancellation before the 29th May, 1903. If an application for cancellation of the sale had not been made under section 310A, it would have been incumbent on the Court to confirm the sale in due course and to grant a sale-certificate to the decree-holders auction-purchasers. When the decree-holders found that a sum of money had been deposited under section 310A by one who asserted a title by purchase, they should have made enquiries, and then at any rate they would have discovered the conveyance of the 4th September, 1900. The decree-holders did not adopt this the obvious course, but, withdrew the amount deposited in Court. In these circumstances, they cannot now be permitted to urge that the sale to the defendant was inoperative.

As a last resort, the respondents have argued that it would have been futile for the decree-holders to oppose the application under section 310A, because, on the authorities as they then stood, the Court would have held that the purchaser of a non-transferable holding was competent to make a deposit under section 310A. No authority, however, has been brought to our notice which would have supported such a contention at the time.

If the decree-holders auction-purchasers had taken exceptions to the deposit, the sole point for consideration would have been, whether or not the person who had made the deposit was a person whose immovable property had been sold. This question would have required decision between the applicant on the one hand and the landlords decree-holders on the other hand. If, upon investigation, the Court had held that the applicant was a person whose immovable property had been sold, the matter would have been set at rest as between the parties. If, on the other hand, it was decided that the applicant was not a person of that description, the matter would equally have ended at that stage; the applicants would not have parted with their money and the sale to the decree-holders would have been confirmed. It would be manifestly unjust to allow the decree-holders now to take up a position directly contradictory to what must be assumed to have been their view when they withdrew the deposited amount on the 29th May, 1903.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

A. T., M.

Appeal allowed.

CIVIL.
1917.
Gadadhar
v,
Midnapore Zemindary Co.
Mookerjee, J.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Walmsley.*

CIVIL.

1917.

*June, 21.
August, 29.*

NOGENDRABALA DASİ

v.

DEBENDRA NATH MAHISH AND OTHERS.*

Pleader and client—Pleader, purchase by—Judgment-debt, if extinguished.

While the relation of pleader and client continues, the pleader cannot as against his client, acquire absolutely a beneficial interest in or title to the subject matter of the litigation antagonistic to that of his client.

Where a pleader for the judgment-debtor purchased from the decree-holder for Rs. 11,500 a decree for a much larger sum :

Held, that the pleader holds the decree assigned to him in trust for his client, and, if called upon by his client to do so, is bound to assign the decree to him. No Court will decree reconveyance except upon equitable term. The effect of the assignment to the pleader is not forthwith to extinguish the judgment-debt and to release the judgment-debtor from liability.

Appeal by the Decree-holder.

Application for execution of decree.

The material facts and arguments appear from the judgment.

Mr. C. R. Das, Babus Biraj Mohan Mojumdar and Mohini Mohan Chatterjee for the appellant.

Babus Brojo Lal Chuckerbutty and Santimoy Mojumdar for the respondents.

C. A. V.

The judgment of the Court was delivered by

August, 29.

Mookerjee, J.—This is an appeal against an order in an execution case to the effect that the decree must be considered as satisfied and the judgment-debtors fully discharged. The events which have led up to this order are not in controversy at this stage. On the 19th February 1907, Rani Mrinalini, wife of Raja Narendra Lal Khan of Narajole, obtained a consent decree in a mortgage suit against the respondents. There were various proceedings in execution which need not be recited for our present purpose. On the 15th February 1915, the present appellant Nagendrabala Dasi, applied to the execution Court to have her name substituted in the place of the decree-holder, on the allegation that she had taken an assignment of the decree on the 7th February, 1915. On the 20th February 1915, the original decree-holder intimated to the Court

* Appeal from Original Order No. 87 of 1916, against the decision of Babu Syama Charan Chakrabarti, Subordinate Judge of Midnapur, dated the 11th March, 1916.

that she had transferred the decree and had no objection to the grant of the application. The judgment-debtors took time to put in objections, but as they did not enter appearance on the day fixed, the name of the appellant was duly substituted and execution was directed to proceed at her instance. Four of the judgment-debtors subsequently applied to the Court to reconsider the matter, and their application was granted. Thereupon, they lodged an objection to the effect that the appellant had not really taken an assignment of the decree, but that her husband Babu Nabakumar Hazra, who was the pleader for the judgment-debtors in the execution case, was the purchaser of the decree and had put forward his wife as the ostensible transferee. The Subordinate Judge then proceeded to determine the question, whether Nagendrabala Dasi or Babu Nabakumar Hazra had taken an assignment of the decree and came to the conclusion that the pleader had purchased the decree with his own money. The Subordinate Judge also found that the assignment had been taken for Rs. 11,500 while a much larger sum was due under the decree. The Subordinate Judge next proceeded to consider what he calls the legal and equitable aspect of this transaction and held that the effect of the purchase of the decree by the pleader for the judgment-debtors was to satisfy the decree and to discharge the judgment-debtors. Nagendrabala Dasi has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been assailed substantially on two grounds, namely, first, that the evidence does not establish that she was not the real purchaser of the decree, assuming that the question can be raised in execution proceedings, and, secondly, that the decree cannot be treated as extinguished, even if it be found that her husband had made the purchase with his own money. We are of opinion that the order of the Subordinate Judge cannot possibly be supported.

In the first place, the Subordinate Judge has decided the question of the reality of the assignment of the decree to the appellant, as if her husband were a party to the present proceedings. The pleader, however, is not and could not be a party to the execution proceedings, and no question could consequently be decided as between him and his wife as to who was the beneficial owner of the decree.

In the second place, even if it were assumed that the pleader had taken an assignment of the decree, (which we do not decide upon the evidence), it is plain that the decree could not be deemed as extinguished and the judgment-debtors treated as fully discharged.

CIVIL.

1917.

Nogendrabala

v.

Debendra.

Mookerjee, J.

CIVIL.

1917.

Nogendrabala

v.

Debendra.

Mookerjee, J.

The Subordinate Judge has not correctly appreciated the law applicable to cases of this character. It is well-settled that while the relation of pleader and client continues, the pleader cannot as against his client acquire absolutely a beneficial interest in or title to the subject matter of the litigation antagonistic to that of his client ; in the language of the framers of section 88 of the Indian Trusts Act, 1882, a legal adviser, who, under such circumstances, gains a pecuniary advantage, must hold for the benefit of his client the advantage so gained. The reason for this rule is obvious ; no person in the position of a pleader, who rightly enjoys the confidence of his client, can be allowed to derive any benefit to the detriment of his client by reason of information acquired during the course of his employment. In *Hobday v. Peters* (1), a mortgagor consulted a solicitor who turned her over to his clerk to assist her gratuitously. The clerk, by reason of information derived during such consultation, bought up the mortgage for less than half the amount. It was ruled by Romilly M. R. that he was a trustee for the benefit of the mortgagor. In *Macleod v. Jones* (2), a solicitor who had purchased securities given by his client for smaller sums than the amount secured, was not allowed to hold the purchased securities as a security to himself for a larger sum than the amount which he had expended in making the purchase. But as the Court had a discretion with regard to the allowance of interest in such cases, the solicitor was allowed five per cent on the sum he had expended in making the purchase : *Mac Leod v. Jones* (3) ; *Re Unsworth's Trusts* (4) ; *Douglas v. Culverwell* (5). The leading decision on the subject is that of *Carter v. Palmer* (6), where the House of Lords ruled that the employment of counsel as legal adviser disqualified him from purchasing for his own benefit charges on his client's estates without permission and that even though the confidential employment ceases, the disability continues as long as the reason on which it is founded continues to operate. *Brown v. Kennedy* (7) ; *Pisani v. A. G.* (8) ; *Macpherson v. Watt* (9) ; *Luddy's Trustee v. Pearl* (10) ; *Rhodes v. Bate* (11) ; *Austin v. Chambers* (12). These principles have been recognised and applied in a variety of cases in

(1) (1860) 28 Beav. 349.

(2) (1833) 24 Ch. D. 289.

(3) (1834) 32 W. R. 660.

(4) (1865) 2 Dr and Sm. 337.

(5) (1862) 4 DeG. F. and J. 20.

(6) (1841) 8 Cl. & F. 657 ; 54 R. R. 145.

(7) (1864) 4. DeG. J. & S. 217.

(8) (1874) L. R. 5 P. C. 516.

(9) (1877) 3 App. Cas. 254.

(10) (1886) 33 Ch. D. 510.

(11) (1865) L. R. 1 Ch. App. 252.

(12) (1837) 6 Cl. & F. 1 ; 49 R. R. 1.

Indian Courts. *Fuzeelun v. Omdah* (1) ; *Nundeeput v. Uryuhart* (2) ; *Subbarayudu v. Kotayya* (3) ; *Aghore Nath v. Ram Churn* (4) ; *Goshain Jag Roop v. Chingun Lal* (5). These cases, however, do not support the view taken by the Subordinate Judge. Assume that a decree for Rs. 10,000 has been purchased, by the pleader for the judgment-debtor, from the decree-holder for Rs. 5,000. On principle and on the authorities, the pleader holds the decree assigned to him in trust for his client, and, if called upon by his client to do so, is bound to assign the decree to him. But no Court will decree such a reconveyance except upon equitable terms. It is impossible on any conceivable principle to justify the position that the effect of the assignment to the pleader is forthwith to extinguish the judgment debt and to release the judgment-debtor from liability. In the case before us, such of the judgment-debtors as have entered appearance have not offered to bring into Court the sum which, according to their own case, the pleader had paid for the purchase of the decree. An additional difficulty has been created by the fact that there are several sets of judgment-debtors whose liabilities are apparently distinct under the decree and who have from time to time paid different sums in reduction of their respective liabilities. Under these circumstances, it is not practicable in these proceedings to go behind the decree and to alter the liabilities of the parties after investigation of the sum which would be equitably payable by the judgment-debtors to the assignee of the decree before they can obtain a reconveyance thereof.

We hold accordingly that this appeal must be allowed and the order of the Subordinate Judge set aside. The assignee (the appellant before us) will be entitled to proceed with the execution of the decree and the execution proceeding will stand revived for that purpose. No steps, however, will be taken in execution till the 1st January, 1918, so that the judgment-debtors may have ample time to institute, if they are so advised, a suit against the assignee of the decree and her husband to obtain a transfer of the decree in their own favour, on proof of the allegations they have made, and upon payment of such sum as the Court may determine. The appellant is entitled to her costs both here and in the Court below. We assess the hearing-fee at five gold mohurs in this Court.

A. T. M.

Appeal allowed.

(1) (1868) 10 W. R. 469.

(2) (1870) 13 W. R. 209.

(3) (1892) I. L. R. 15 Mad. 389.

(4) (1896) I. L. R. 23 Calc. 805.

(5) (1870) 2 All. H. C. R. 46.

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Nogendrabala

v.

Debendra.

Mookerjee, J.-

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice
Beachcroft.*

CIVIL.

1917.

August, 23, 24.

PADMA LOCHAN PATAR

v.

GIRIS CHANDRA KIL.*

Limitation—Limitation Act (IX of 1908), Sec. 19, Sch. I, Art. 78—Acknowledgment—Hundi and cheque, payment by—Hundi and cheque dishonoured—Plaint, amendment of—Civil Procedure Code (Act V of 1908) O. 6 R. 17.

Article 78, schedule I of the Limitation Act has no application to a suit to recover money alleged to be due on accounts taken between the parties, though a payment by the defendant by a cheque and a hundi was dishonoured on presentation. Such payment does not constitute an acknowledgment within the meaning of section 19 of the Limitation Act.

Though under rule 17 of order 6 of the Code of Civil Procedure, very wide powers of amendment are vested in the Court, an application for amendment in the second appellate Court was disallowed on the ground that the plaintiff would start afresh on allegations wholly inconsistent with those made in the original plaint, and to support the new allegations, he would have to bring forward evidence directly contradictory to the evidence already placed by him on the record.

Appeal by the Defendant and cross-objection by the Plaintiff.

Suit for recovery of money.

The material facts and arguments are set forth in the judgment.

Babus Biraj Mohan Mojumdar and Bhagirath Chunder Das
for the Appellant.

Dr. Dwarka Nath Mitter and Babu Bejoy Kumar Bhattacharjee
for the Respondent.

C. A. V.

The judgment of the Court was delivered by

August, 24.

Mookerjee, J.—This appeal arises out of a suit for recovery of Rs. 3,954-4 as. The Court of first instance gave the plaintiff a decree for Rs. 976-6 as. Upon appeal, the District Judge has modified that decree, and we have before us an appeal by the defendant as also a memorandum of cross-objection by the plaintiff. The appeal and the cross-objection raise two questions upon which the Courts below have taken divergent views. The first question relates to a sum of Rs. 168-8-6; with regard to this, the defendant contends

* Appeal from Appellate Decree No. 1228 of 1916, against the decree of C. Twidell Esq., District Judge of Bankura, dated the 30th March, 1916, modifying that of Babu Ambica Charan Mojumdar, Subordinate Judge of Bankura, dated the 25th January, 1915.

that the claim is barred by limitation. The second question relates to a sum of Rs. 2,000; with regard to this, the Court of first instance dismissed the suit, but the District Judge has granted the plaintiff leave to abandon his claim with liberty to institute a fresh suit under order 23 rule 1 of the Civil Procedure Code, 1908.

CIVIL.
1917.
Padma
v.
Girish.
Mookerjee, J.

As regards the first point, there can be no doubt that the sum really accrued due more than three years prior to the institution of the suit. The plaintiff contends that the claim is not barred by limitation under Art. 78 of the first schedule to the Indian Limitation Act. He relies upon the circumstances that the defendant sent him on the 26th February 1911 a hundi for Rs. 300 and on the 22nd July 1911, a cheque for Rs. 50 which were dishonoured on presentation. His case consequently is that this attracts the application of Art. 78, which provides that a suit by the payee against the drawer of a bill of exchange (which has been dishonoured by non-acceptance) must be instituted within three years from the date of the refusal to accept. The suit before us, however, is not one of this description. It is a suit to recover money alleged to be due on accounts taken between the parties; to a suit of this description, article 78 can have no possible application. On behalf of the plaintiff, this was clearly realised, and an endeavour was made to support the decree of the District Judge on the ground that the delivery of the hundi and the cheque constituted an acknowledgment within the meaning of section 19 of the Indian Limitation Act. In our opinion, there is no foundation for this contention. The decision in *Raman v. Vairavan* (1), is clearly distinguishable; there the cheque was accompanied by a letter which contained an acknowledgment sufficient for the purposes of section 19. We must hold that the view taken by the Subordinate Judge in this respect was correct and his decision should not have been revised by the District Judge.

As regards the second point, no order could properly have been made under rule 1 of order 23. The plaintiff sought to recover Rs. 2,000 upon certain allegations which were found untrue by the trial Court. On appeal the District Judge came to the same conclusion, but he held that the plaintiff might be permitted to abandon his claim, with liberty reserved to him to institute a fresh suit on the same cause of action. The plaintiff subsequently presented an application to the District Judge, whereupon an order was made under rule 1 of order 23. The plaintiff, however, notwithstanding this order, has preferred a cross-objection to this Court, to the effect that the view taken by the Courts below as to this sum of Rs. 2,000

(1) (1883) L. L. R. 7 Mad. 392.

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is not correct. We are of opinion that, in such circumstances, the order under rule 1 of order 23 should not have been made.

As a last resort, the plaintiff seeks for leave to amend his plaint. We are not unmindful that under rule 17 of order 6, very wide powers of amendment are vested in the Court; but we are clearly of opinion that the application of the plaintiff for leave to amend his plaint at this stage should not be entertained. The object of the proposed amendment is to abandon the claim deliberately put forward in the trial Court and persistently reiterated in the Court of appeal below. If the amendment is granted, the result will follow that the plaintiff will start afresh on allegations wholly inconsistent with those made in the original plaint, and, to support the new allegations, he must bring forward evidence directly contradictory to the evidence already placed by him on the record. Such a feat he should not be encouraged to perform: *Kokilasari v. Rudranand* (1); *Ghurphehni v. Purmeshwar* (2); *Mohesh v. Radha Kishen* (3); *Kisandas v. Rachappa* (4); *Ramji Ram v. Salig Ram* (5); *Sri Rang v. Rachhaya* (6).

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored, subject to this variation that interest will run at the rate of six per cent. per annum as allowed by the District Judge. This order will carry costs both here and in the Court of appeal below.

A. T. M.

Appeal allowed.

(1) (1906) 5 C. L. J. 527.

(2) (1907) 5 C. L. J. 653.

(3) (1907) 6 C. L. J. 580.

(4) (1909) I. L. R. 33 Bom. 644; 11 Bom. L. R. 1048.

(5) (1911) 14 C. E. J. 188.

(6) (1911) 15 C. E. J. 439.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

BHAIRAB CHANDRA DUTT

v.

NANDIRAM AGRANI AND ANOTHER.*

Receiver—Appointment of—Security—Order or decree, propriety of, if can be challenged collaterally—Jurisdiction—Error of Law.

The propriety of an order or decree made in a cause in which the Court has jurisdiction, cannot be challenged collaterally. This general principle applies to an order for appointment of a receiver by a Court of competent jurisdiction.

Jurisdiction is a power of a Court to hear and determine cases, to adjudicate or exercise any judicial power with reference to them. The Court may commit an error of law, in the exercise of its jurisdiction; but the fact that such error of law has been committed does not divest the Court of its jurisdiction.

Where the lower Court was directed by the appellate Court to appoint a receiver and take security from him and the former appointed a receiver without taking security:

Held, that the appointment was not without jurisdiction.

Appeal by the Plaintiff.

Suit for recovery of possession of land on declaration of title.

The material facts and arguments appear from the judgment.

Babus Mahendra Nath Ray and Jogendra Nath Mukherjee for the Appellant.

Babus Provas Chunder Mitter, Biraj Mohon Mojumdar, Panchanon Ghose and Bankim Chunder Ghose for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiff in a suit for recovery of possession of land on declaration of title. The plaintiff is a receiver appointed by the Subordinate Judge of Howrah in a suit instituted by Jogen Chunder Dutt against Rajendra Chandra Banerjee. In that suit, Jogen Chunder Dutt asked for a declaration that the property then in dispute had been purchased by him in the name of Rajendra Chandra Banerjee. On the 6th January, 1914, Jogen Chunder Dutt applied for the appointment of a receiver. On the 19th February, 1914, the Subordinate Judge rejected the application on the ground that in his opinion sufficient reasons had not been assigned for the appointment of a receiver.

* Appeal from Original Decree No. 29 of 1917, against the decree of Babu Debendra Nath Pal, Subordinate Judge of Howrah, dated the 8th December, 1916.

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1917.

August, 15.

August, 15.

CIVIL.

1917.

Bhairab

v.

Nandiram.

Meekerjee, J.

Jogen Chunder Dutt then appealed to this Court, with the result that, on the 27th April, 1914, the order of the Subordinate Judge was set aside and the case was remitted to him with instructions to appoint a receiver. This Court also directed that security should be taken from the person so appointed. When the matter went back to the Subordinate Judge, he proceeded to appoint a receiver on the 20th July, 1914. The receiver was accepted as a fit and proper person by both the parties and the order of the Subordinate Judge was in these terms: "Babu Bhairub Chandra Dutt, a pleader of this Court, is appointed a receiver of the said property by common consent, and the Court commits the said property to his possession and management by removing the defendants from the possession or custody thereof. The receiver is hereby empowered to bring and defend suits in respect of the property aforesaid and realise rents and profits. The receiver is further authorised to bring a suit against one Nandiram Agrani, (that is, the respondent before us), for recovery of possession of the land; the latter is said to be in wrongful occupation of the lands; and the costs thereof will be met by the plaintiff until further order of this Court." The receiver thereupon instituted the present suit on the 6th December, 1915. On the 8th December, 1916, the Subordinate Judge dismissed the suit on the ground that the receiver was not competent to maintain the action, because, as he had not furnished security, his appointment was inoperative in law. In our opinion this view cannot possibly be supported.

We shall assume, for the present purpose, that this Court, when it remitted the case to the Subordinate Judge with directions to appoint a receiver, also held that security should be taken from the person selected. We shall assume further that either through oversight or misinterpretation of the order of the High Court, the Subordinate Judge omitted to call upon the receiver to furnish security. The fact is unquestionable that the Subordinate Judge did appoint a receiver and did not take security as directed by this Court. The real point in controversy is, was the order of the Subordinate Judge an order made without jurisdiction and consequently liable to be challenged in a collateral proceeding, or was it merely an erroneous order which might be rectified by himself, of his own motion, or on an application for review by the parties concerned, or, by way of an appeal preferred by them to a superior tribunal. It is indisputable that the propriety of an order or decree made in a cause in which the Court has jurisdiction cannot be challenged collaterally. This general principle applies to an order for appointment of a

receiver by a Court of competent jurisdiction and was applied in *Greenawalt v. Wilson* (1), where it was ruled that in an action brought by a receiver for the recovery of a property claimed by him by virtue of his receivership, the defendant will not be permitted to question the propriety, regularity or necessity of his appointment. The respondent has consequently been driven to contend that the order was made without jurisdiction, and, in support of this view, has placed reliance upon the decision in *Edwards v. Edwards* (2). That case, however, is clearly distinguishable. There, the order whereby the receiver was appointed called upon him to give security, and the Court held that he could not be receiver until he gave security; when he had done so, he could take possession, because the order for appointment was really conditional. See also *Defries v. Creed* (3); *Exp. Evans* (4). Here the order of the Subordinate Judge was not conditional but absolute in its terms, and took immediate effect. It is impossible to maintain the view that an order which is erroneous in law is necessarily an order made without jurisdiction. It is not necessary for our present purpose to define the exact meaning of the term 'jurisdiction'; but jurisdiction may be taken to be the power of the Court to hear and determine cases, to adjudicate or exercise any judicial power with reference to them. In the exercise of its jurisdiction, the Court may commit an error of law; but the fact that such error of law has been committed does not divest the Court of its jurisdiction. In the case before us, the Subordinate Judge had undoubted jurisdiction to appoint a receiver under the provisions of the Code of Civil Procedure. He held originally that the circumstances of the case did not justify the exercise of the jurisdiction vested in him. This Court took a contrary view and directed him to appoint a receiver. The Court also prescribed the mode wherein that power should be exercised, namely, that security was to be taken from the person selected for appointment. The Subordinate Judge, for some unexplained reason, did not comply with the directions of the Court in this respect; but that did not oust his jurisdiction. We are clearly of opinion that the order for the appointment of the receiver was operative in law and that the ground which has been assigned by the Subordinate Judge for the dismissal of the suit cannot be supported.

The result is that this appeal is allowed, the decree of the

(1) (1893) 52 Kan. 109; 34 Pac. 403.

(2) (1876) 2 Ch. D. 291.

(3) (1865) 34 L. J. Ch. 607.

(4) (1879) 13 Ch. D. 252.

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1917.
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Nandiram.
Mookerjee, J.

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1917.
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 Nandiram.
Mookerjee, J.

Subordinate Judge set aside and the case remanded for trial in accordance with law. The appellant is entitled to his costs in this Court, as also Rs. 16 as costs of the hearing before the Subordinate Judge. We further direct that a certificate be granted to the appellant under section 13 of the Court-Fees Act to enable him to obtain a refund of the court-fees paid on the memorandum of appeal to this Court.

A. T. M.

Appeal allowed : Case remanded.

Before Mr. Justice Teunon and Mr. Justice Newbould.

GNANENDRA KUMAR RAI CHOWDHURY AND OTHERS

CIVIL.
1918.
 January, 25, 28.

SREE SREE SHYAM SUNDAR JIU AND LAKSMI
 THAKURANI.*

Execution—Application in accordance with law—Property specified in list could not be proceeded against—Application to proceed against fresh property, if to be granted—Continuance—Civil Procedure Code (Act V of 1908) O. 21, rr. 13, 17 (2).

A rent decree was obtained on the 28th November, 1911. An application for execution was made on the 23rd November, 1914. This application was in accordance with law. Later, on objection taken by the judgment-debtors, it was discovered that against the properties specified in the list furnished under order 21 rule 13 of the Code of Civil Procedure, proceedings could not be taken and accordingly on the 14th January, 1915, the decree-holder made an application to the Court requesting the Court to accept a further list of properties and praying that execution should proceed by attachment and sale of those properties :

Held, that it was open to the decree-holder to ask the Court to proceed against the properties specified in his further and supplementary list and that list was part of the original application under the provisions of order 21, rule 17 (2) of the Code of Civil Procedure. That if a fresh application were necessary, that application was made in continuance of the application first presented on the 23rd November, 1914.

Asgar Ali v. Troilokya (1); and *Salimullah v. Sainaddi* (2) distinguished.

Appeal by the Decree-holders.

* Appeal from Appellate Order No. 487 of 1915, against an order of A. H. Cuming Esq., District Judge of 24-Perganas, dated the 1st July, 1915, reversing that of Babu Rajendra Lal Sadhu, Munsiff of Baruipore, dated the 26th March, 1915.

(1) (1850) I. L. R. 17 Calc. 631.

(2) (1913) 18 C. L. J. 538.

Application for execution of decree.

The material facts appear from the judgment.

Babu Surendra Madhub Mullick for the Appellants.

Babus Joges Chandra De and *Khitis Chandra Chakravarty* for the Respondent.

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1918.

Gnanendra

v.

Shyam Sundar Jiu.

The judgment of the Court was as follows :

January, 28.

This appeal arises out of certain proceedings in execution. The decree in question being a rent decree was obtained against certain persons as shebaita of a certain *Thakoor* on the 28th November, 1911. The application for execution was made on the 23rd November, 1914. On its face the application was one in accordance with law. Later, on objection taken by the judgment-debtors it was discovered that against the properties specified in the list furnished under order XXI, rule 13 proceedings could not be taken and accordingly on the 14th January 1915, the decree-holder made an application to the Court requesting the Court to accept a further list of properties and praying that execution should proceed by attachment and sale of those properties. It has been held by the first appellate Court that the application having been admitted and registered the proposed amendment could not be accepted and that it would be necessary for the decree-holder to make a fresh application in execution. In coming to this conclusion the Court relied upon the decision of a Full Bench of this Court, *Asgar Ali v. Troilokya* (1), and in this Court, we may observe, a further reference has been made to the case, *Salimullah v. Sainaddi* (2). But the present case may be distinguished from both those cases in that in those two cases the application as originally made was one not made in accordance with law and that it contained no list of properties against which the proceedings were intended to be taken. In the present case as we have already pointed out the matter is different. Here there was a list of properties, the application was one made in accordance with law and it was only on the objection taken by the judgment-debtors that it was discovered that against those properties execution could not proceed. We are not of opinion that in a case such as this the decree-holder should be confined to the properties he had originally specified and we think that it was open to him to ask the Court to proceed against the properties specified in his further and supplementary list. We are further of opinion that that list should be taken as part of the original application under the provisions of order XXI,

(1) (1890) I. L. R. 17 Calc. 631. (2) (1913) 18 C. L. J. 538.

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1918.

Gnanendra

v.

Shyam Sundar Jiu.

rule 17(2), or if a fresh application were at all necessary that that application should be treated as one made in continuance of the application first presented on the 23rd November, 1914.

In this view no question of limitation arises and we therefore set aside the order of the first appellate Court and decree this appeal with costs. The decree-holder will now be at liberty to proceed in execution as on his application of the date 23rd November, 1914.

We assess the hearing-fee at three gold mohurs.

A. T. M.

Appeal allowed.

CIVIL REFERENCE.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr.
Justice Beachcroft.*

NEPUSI BEWA

v.

NASIRUDDIN.*

CIVIL.

1917.

March, 22.

August, 30.

Succession Certificate Act (VII of 1889), Sec. 4 Sub sec. (1) (a)—Plaintiff, death of—Substitution—Suit for recovery of money.

Section 4, sub-section 1, clause (a) of the Succession Certificate Act applies to the case of a person who has been substituted as plaintiff for one who has died pending a suit for recovery of money due on a bond. No decree can be passed in favour of the substituted plaintiff without the production of a succession certificate; *Sahadev v. Sahkawat* (1) followed.

Reference under rule 1 of order 46 of the Code of Civil Procedure by the Munsiff.

The judgment of the Court was delivered by

Mookerjee J.—This is a Reference under rule 1 of order 46 of the Code of Civil Procedure, 1908. The question referred has been framed by the Court below in these terms: "Whether section 4 of the Succession Certificate Act would apply at all to the case of a person who has been substituted as plaintiff for one who has died pending the suit." The Reference, however, must be limited to the true scope of clause (a) of sub-section (1) of section 4 as we are concerned with a suit and not with an execution proceeding which is governed by section 4 (1) (b).

*Civil Reference No. 1 of 1917 by Babu Sris Chandra Banerjee, Munsiff of Bogra in Suit No. 997 of 1916 (Small Cause Court).

(1) (1907) 7 C. L. J. 658.

August, 30.

One Dalimullah Mandal instituted this suit on the 28th August 1916, for recovery of money due on a bond. The plaint was registered, and the case was fixed for disposal on the 21st September, 1916. On that date it was reported that the plaintiff was dead, and the case was adjourned. On the 15th December, 1916, the widow of the deceased plaintiff applied, for herself and on behalf of her infant sons and daughters, for leave to prosecute the suit and an order for substitution was accordingly made. The trial Court has now made this Reference for the determination of the question, whether the substituted plaintiffs can obtain a decree against the defendant without the production of one of the certificates, mentioned in section 4 of the Succession Certificate Act. We are of opinion that a decree cannot be passed in favour of the substituted plaintiffs without the production of such a certificate.

The question raised is really concluded by authority. In the case of *Sahadev Sukul v. Sakhawati Hossain* (1), a suit had been instituted on a mortgage for recovery of the dues of the mortgagee, first by sale of the mortgaged properties, and then by the sale of other properties of the mortgagor. The Court made the usual decree for sale; the mortgaged premises were sold, and the sale proceeds proved insufficient to satisfy the judgment debt. Meanwhile, the mortgagee had died, and his legal representative applied to the Court to pass a personal decree against the mortgagor under section 95 of the Transfer of Property Act. Objection was taken on behalf of the mortgagor that a decree could not be made in favour of the applicant except on production of one of the certificates mentioned in section 4 of the Succession Certificate Act. The Court of first instance overruled this objection and passed a decree under section 90. Upon appeal this decision was reversed. On second appeal to this Court, it was argued that as the succession had opened out during the pendency of proceedings in Court, a succession certificate was not necessary. This contention was overruled, and the view taken by the District Judge was affirmed, notwithstanding the doubt expressed in the case of *Baid Nath v. Shamanand* (2), where this particular point did not arise for decision. Precisely the same view was independently adopted by Maclean, C. J. and Coxe, J in *Abdul Sattar v. Satya Bhushan* (3) which was decided before the case last mentioned had been reported.

Maclean, C. J., held that having regard to section 4 of the Succession Certificate Act, the Court could not pass a decree

(1) (1907) 7 C. L. J. 658; 12 C. W. N. 145.

(2) (1894) I. L. R., 22 Cal., 143.

(3) (1908) I. L. R. 35 Cal., 767.

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under section 90 in favour of the personal representative of the mortgagee, till a certificate had been granted to him under any of the Acts mentioned in that section and that the fact that a certificate had been subsequently granted was not sufficient to get rid of the difficulty in his path created by the clear language of section 4. The view taken in these two cases is in accord with that of Farran, J. in *Vasques v Pragji* (1), where he held that upon the death of the plaintiff *pendente lite*, though the suit may be continued by his representative a certificate in proof of his representative title must be produced before a decree can be passed in his favour. The comprehensive language used in section 4 (1) (a), namely, that, "No Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof," is undoubtedly capable of the interpretation adopted in these cases. The claim contemplated by section 4 (1) (a) is a claim made by a person in the capacity of and as a personal representative of a deceased person, and from the point of view of the purpose of the statute as set out in the preamble, it is clearly immaterial, whether the decree has to be made in favour of a personal representative who has himself instituted the suit or in favour of one who has taken the conduct of the suit in hand after its institution by the original creditor. The essence of the matter is that, in both the cases, when the decree is passed, it is passed in favour of a person who claims to be entitled to the effects of the deceased person and who must consequently produce proof of his representative title. Whether the same principle does or does not apply to execution cases, does not arise for consideration on the present Reference, but it may be observed that there appears to be a substantial difference in phraseology between clauses (a) and (b); the former contemplates the point of time when the decree is passed; the latter refers to the point of time when the Court is called upon to proceed on the basis of the application for execution: *Mahomed Yusuf v. Abdur Rahim* (2). We hold accordingly that section 4 (1) (a) of the Succession Certificate Act applies to the case of a person who has been substituted as plaintiff upon the death of the original plaintiff during the pendency of the suit.

The records will be returned to the Court below; if the trial Judge holds that the plaintiffs are entitled to a decree, a reasonable opportunity must be afforded to them to produce the requisite certificate.

A. T. M.

(1) (1892) I. L. R. 16 Bom. 519.

(2) (1899) I. L. R. 28 Calc. 839.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Sir Asutosh Mookerjee, Knight, Judge.

KALIDAS CHOWDHURY AND OTHERS

v.

SRIMATI DRAUPADI SUNDARI DASSEE.*

CIVIL.

1917.

February, 2.

Limitation—Limitation Act (IX of 1908), Sec. 19, Sch. I Art. 106—Plaint, amendment of—Acknowledgment of partial liability.

Where the plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation.

The suit contemplated by article 106 of the Limitation Act, is to be brought by a plaintiff who has ceased to be a member of the partnership (which is not for a fixed term) by his retirement, and, has consequently become entitled to claim an account and a share of the profits.

Where there was an unconditional promise to pay whatever might be found due upon accounts taken, down to a certain period, coupled with an express denial of liability to account for the subsequent period, section 19 of the Limitation Act saves that portion only of the claim which is admitted in the letter.

Per Mookerjee, J: No account can be directed in respect of a partnership business in the absence of one of the partners.

The Court is very reluctant to deprive a defendant, by amendment of a plaint, of a valuable right, which he has already acquired by the operation of the statute of limitation.

An acknowledgment to take a case out of the statute of limitation must be, first, one from which an absolute promise to pay can be inferred, or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed. Consequently the effect of the acknowledgment must depend, in each case, upon the nature of the particular right claimed and the terms of the acknowledgment.

Appeal by the Defendants.

Suit for an account of a dissolved partnership business.

The material facts are stated in the following judgment of

Greaves, J.—This is a claim brought by the executrix and widow of one Hari Prosad Saba deceased against the defendants as partners in the firm in which he acted as Guddian Gomastha, for an account of the profits and loss of the partnership down to the 27th June, 1910; which is the date when the plaintiff retired from the partnership on the footing that his share in the partnership amounts

* Appeal from Original Decree No. 61 of 1916, against the decree of Mr. Justice Greaves, dated the 31st January, 1916, sitting on the Original Side.

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to $\frac{1}{8}$ th share therein. The only issue that arises for decision in this case is whether the plaintiff's claim is not barred by limitation. If the claim is not barred by limitation, counsel for the defendant submits that the plaintiff is entitled to have an account upon the footing which I have already stated. On behalf of the defendants it is contended that a period of 3 years limitation applies and that the case falls within article 106 of the Limitation Act namely that this is an action for an account of the share of profits of a dissolved partnership. The suit was commenced on 8th February, 1913, but it became necessary to add a party named, Draupadi Sundari Dasee. On the 12th February, 1914, accordingly an order to that effect was made on that date and consequently, I do not think it is disputed by the plaintiff, the suit must be deemed to have commenced on 12th February, 1914, and consequently if that Art. 106 is applicable to this case then the plaintiff's claim is barred by limitation. But in my opinion Art. 106 is not applicable to the circumstances of this case. That article applies to a dissolved partnership. (Now it appears upon the pleadings in this case and I do not think this is denied, that the partnership has not been in fact dissolved.) This also appears in the evidence. The statement in the plaint is contained in paragraph (1) which is to this effect:—"That it was agreed that on the death of any of the Shaha Chowdhury partners, the heir or heirs of such deceased partner shall take his place and become partner or partners of such business and that the said business will not be dissolved by the death or deaths of any of the Saha Chowdhury's partners." The result is that in my opinion Art. 105 is not applicable and only applies to a partnership which has in fact been dissolved. The result is that section 120 applies and the period of 6 years is the limitation period with the result that this suit is not barred by limitation. It was argued at some considerable length that there has been an admission of liability by the defendants to an account and the two letters that were mainly relied on were Exhibit C which is a letter of 22nd October, 1912, written to the plaintiff by one Tarkesser who was a gomastha and written at a time when he was on leave. The second letter that was relied on is the letter of 21st January, 1913 exhibit 1st in this case written by the attorneys of the defendants to the plaintiff and expressing their willingness to have an account taken upto period when the plaintiff left Calcutta *i. e.* up to the year 1311, which approximately would correspond to the English year 1904. This point was argued at considerable length and various authorities were cited but having regard to the fact that

I hold Art. 120 and not Art. 106 is the article that is applicable, this second point does not arise for decision. The result is that there must be a declaration that the plaintiff retired from the firm of Dwarkanath Makhan Lal Saha on 27th June, 1910, and there will be the usual partnership account from the last adjustment of account down to the 27th June, 1910 on the footing that the plaintiff's husband Hari Prosad Shaha was entitled to a 3 as. share of the profits as the managing partner. The plaintiff will have the cost of the suit on scale No. 2 and the costs of the account will be reserved. The Assistant Referee will take the accounts.

Against this judgment, the defendants appealed.

Messrs. S. R. Das and B. L. Mitter for the Appellants.

Messrs. B. C. Mitter and N. Sarkar for the Respondents.

The judgments of the Court were as follows :

Sanderson, C. J.—This is an appeal from a judgment of my learned brother Mr. Justice Greaves, and the sole question which has been argued before us is whether the claim in the suit was barred by the statute of limitation.

I will deal in detail with the nature of the suit directly.

The suit was brought on the 8th of February 1913, and it was alleged to be in respect of a certain partnership of which the plaintiff Hari Prosad Saha was a member up to the 27th of June 1910. Before the case came on for trial, it was discovered that a necessary party, Mokshada Sundari Chowdhurani, had not been added and she was added on the 12th of February 1914, so that as regards the added party, the claim was barred or was alleged to be barred, and consequently as she was a necessary party, the claim was alleged to be barred against the other parties. Therefore, when the case came on for trial, the learned counsel appearing for the defendant Mr. S. R. Das, according to the minutes said 'The suit is barred as they had added Mokshada Sundari as a party defendant after the lapse of three years.' Mr Mitter said 'I know nothing about it my friend should have raised the point by a supplemental written statement. But there is an admission of liability by the letter dated the 12th of August 1913'. Then the learned standing counsel said further on 'I shall put in a formal petition showing admission of liability, but if I require any other amendment I shall then ask for an adjournment. But I do not think I shall require.'

Then there were two paragraphs added by way of amendment, whereby 'the plaintiff submitted that there had been a valid admission of liability in writing signed by the defendants or their duly

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authorised agents within the period of limitation and such admission was contained in the letters of the 5th of July, 1909, 2nd of October, 1912, 6th of October 1912, 21st of January, 1913, and in the written statement, filed in this suit:’ and ‘the plaintiff was advised and submitted that the proper period of limitation in the suit was six years from the time that the original plaintiff had retired from the partnership business.’ Those paragraphs were added on the day of the trial, the 31st of January, 1916

Then the learned counsel for the defendant, Mr. Das said, that he did not rely any longer upon that part of the defence which set up the allegation that the plaintiff had only remained with the firm, to use a neutral expression, up to 1311. B. S. (corresponding with 1904—05), but that he simply relied upon the statute of limitation. The learned Judge held that as regards the statute of limitation, article 120 of the second schedule to the Limitation Act applied and therefore the suit was not barred.

The case now comes before us, the learned counsel for the appellant urging that the learned Judge was wrong, and that article 106 applies and consequently the suit is barred by the Limitation Act. It is necessary to refer perhaps once more to the words, of the statute. Section 3 says, “subject to the provisions contained in sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation presented therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.” Then in the first schedule one finds three columns, which of course are familiar to every body—the first column of which sets out the description of the suit, the second, the period of limitation, and the third, the time from which the period begins to run. Therefore, it is necessary to see what is the description of the suit in the first instance; and, for that purpose I turn to the plaint. But before I turn to the plaint perhaps I might refer to two letters to see, quite apart from the plaint, what was the real nature of the suit. On the 27th of June 1910, the plaintiff’s solicitor wrote a letter saying “we are informed by our client Babu Hari Prosad Saha...that he has been acting as *gomastha* of the firm of Dwarka Nath Makham Lal Shaha since its constitution in the year 1279 B. S., on the express understanding that he should receive three annas share of the net profits as his remuneration It is for this reason that our client has been obliged to have recourse to this letter in order to impress upon you the earnestness of his desire and has instructed us to give you notice, which we hereby do, that he retires from the firm and all his connection therewith will

cease from the beginning of the ensuing business year of the said firm which commences in the Bengali month of Asar or Srabran every year." That might be said to be a letter which cuts both ways: it may be said to be quite consistent with the position that the plaintiff Hari Prosad Saha was a mere *gomasta* and servant remunerated by a share in the profits, or there are some phrases in it which go to show that he was alleging that he was a partner of the firm. But looking at the next letter written by the plaintiff's solicitor on the 10th of January 1913, I find it is in these terms, "I understand from my client Babu Hari Prosad Shaha of Usapura in the District of Pabna that he was a non-capitalist partner in the firm of Dwarika Nath Makhamlal Shaha carried on in Calcutta for several years and retired from the partnership sometimes on the 27th of June 1910, after giving you notice on that day through his then solicitors Messrs. Dutta & Guha. My client requested you several times to arrive at an adjustment of accounts up to the dissolution aforesaid of the said co-partnership firm of Dwarikanath Makhamlal Shaha and to pay to him out of the assets of the partnership what on such adjustment should be found due to my client but nothing has yet been done in that direction. I am further informed that a large sum of money will be found to be due to my client on such adjustment being made as aforesaid. I am now instructed by my client to request you which I hereby do to adjust the said accounts and thereafter to pay the amount due to him within a week from the date hereof so that no unpleasantness may arise in this connection which my client is eager to avoid if possible."

I think nobody can doubt upon reading that letter that the plaintiff's solicitor was putting forward a position that his client, the plaintiff, had been a non-capitalist partner, that on the 27th of June, 1910, he gave notice that he was retiring from the firm, and he treated it as a dissolution of the partnership which had existed up to the 27th of June, 1910.

Then, when we come to the plaint, as my learned brother pointed out in the course of the argument, this is a plaint apparently to which some extraordinary importance was attached, because although it was drawn by Mr. S. K. Chakraverty, but the parties were not satisfied with that and they got it settled by the Advocate-General. Upon looking at the plaint, to my mind it is obvious that it was a plaint which was based upon the allegation that the plaintiff had been a partner in the partnership business, because it says in the 1st paragraph, that "the defendants" (setting out the names), "and the plaintiff agreed to carry on business in Calcutta in co-partnership

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and that it was agreed that on the death of any of the Saha Chowdhury partners the heir or heirs of such deceased partner will take his place and become a partner or partners of such business and that the said business will not be dissolved by the death or deaths of any of the Saha Chowdhury partners." So that there is a distinct allegation that the parties agreed to be partners and that there was a term in the agreement—which is somewhat out of the ordinary—that as regards the Saha Chowdhury partners the death of one of them would not put an end to the partnership. But there was no arrangement that if the plaintiffs were to retire or were to die, his death would not as in the ordinary course put an end to the partnership.

Then in the third paragraph it is further alleged that "the plaintiff under the denomination of Godian Gomasta contributed labour and skill for the promotion and carrying on of the said business but he did not bring in any capital and it was agreed and arranged that the plaintiff should get $\frac{1}{8}$ share of the profits and bear $\frac{1}{8}$ share of the loss arising from the said business. The plaintiff is advised and submits that his position in the said firm was that of a non-capitalist working partner and that in any event."—I suppose that means whether in point of fact or of law a partner or not "he is entitled to have the accounts of the said firm taken on the basis aforesaid and to receive from the defendants what may be found due upon the taking of such accounts." Then in paragraph 6 it says that "the plaintiff being desirous of retiring from the said business gave formal notice to all the partners on or about the 27th day of June 1910 of such retirement through his then attorneys Messrs Dutta and Guha and called upon them to have the accounts of the said partnership adjusted and to pay the plaintiff his share of such profits as on such adjustment might be found due to him." The plaintiff's prayer was that it might be declared that the plaintiff retired from the said firm of Dwarika Nath Makham Lal Saha on or about the 27th of June 1910, and if necessary it might also be declared that so far as he was concerned the said partnership came to an end and was dissolved at that time, and that the accounts of the said firm might be taken by and under the direction of this Court to ascertain what amount was due to the plaintiff as his share of the profits of the said firm at the time of his retirement.

Therefore, when I consider what was the description of the suit which the plaintiff was bringing in this case, I have no doubt whatever that it was a suit which would come within the exact description of clause 106 which is as follows: "Suit for an account

and a share of the profits of a dissolved partnership," as his prayer is,—as I have said just now—for a declaration that he retired from the said firm on a certain date, that so far as he was concerned, the partnership was dissolved at that time, that accounts might be taken, and upon such accounts being taken he might get what share of the profits would be found due to him.

If I had any doubt about this, that doubt would be removed by referring to the provisions of the Indian Contract Act and seeing what the definition of the term 'Partnership' is in section 239 of that Act, which provides "Partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them." Then section 253 provides "In the absence of any contract to the contrary, the relations of partners to each other are determined by the following rules":—and rule (7) provides, "if, from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members:" Rule (8) provides, "unless the partnership has been entered into for a fixed term, any partner may retire from it at any time."—In this case there is no suggestion that the partnership was for a fixed term. That being so, the plaintiff might retire from the partnership at any time; and, if he retired from it at any time, then he ceased to be a member of the partnership by reason of his retirement, and the result was that by reason of the provisions of the Contract Act the partnership was dissolved not only as between him and the other members but as between all the other members.

To my mind there is no doubt whatsoever that that was the description of the suit which the plaintiff brought and that it came within article 106, and that inasmuch as the suit must be deemed to have been brought on the 12th of February 1914, it was brought after the period of limitation specified in the schedule to the Limitation Act, and was therefore barred unless it can be said to have been brought within the provisions of section 19 by reason of the alleged acknowledgment in the letters to which I have referred.

Now, before I deal with the acknowledgment, I have to deal with the point which was urged, and strongly urged by the learned Standing Counsel that even if this Court were of opinion that the suit did come within article 106, the plaintiff ought to have an opportunity to amend his claim.* In order to see whether the plaintiff ought to have such leave, it is necessary to examine what it is that he wants to do.

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The plaintiff, as I have already said, brought his suit based upon the allegation that there was a partnership existing between him on the one hand and the defendants on the other. When it is found that that suit is barred by the Limitation Act, he then wished to turn round and bring a suit which is based upon the allegation that he is not a partner but is merely a servant of the defendants, although he was to be remunerated by receiving a share of the profits which would, in fact, as was pointed out by the learned counsel for the appellant, amount to this that he wants to abandon all the material allegations which are set out in his plaint, and adopt those which are set out in the defendants' written statement. If we were to grant his application for amendment, it would amount to granting him leave to bring a fresh suit of an entirely different nature, which suit if brought now would be barred by the statute of limitation. It has been said that every amendment ought to be granted if the party against whom the amendment is granted can be compensated by an order as to costs. But this is not one of the amendments which can be cured by the panacea of costs, because if we were to allow the amendment, we would be allowing the plaintiff to bring an action within the time specified in the schedule, whereas if we were not to grant the amendment, his suit might be barred by the Limitation Act. For these reasons I do not think it right and just to allow the amendment to be made.

With regard to the question of acknowledgment, that depends upon section 19 of the Limitation Act, which runs in these words, "Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed." The letter upon which the real reliance was placed in this case was the letter of the 21st of January 1913, which was written by the solicitors of the defendants, and therefore it would be *signed* by a person who is an agent 'duly authorized in this behalf' and no point arises in that respect: and, it is also an acknowledgment of some liability to the plaintiff. But the question is whether it is an acknowledgment of the property or right which is the subject matter of the suit.

Now, what was said is this "your client Bābu Hari Prosad Saha was the Gomastha at Calcutta in the employ of the firm of Dwarika Nath Makhanlal Saha, remunerated by share of the profits, and

being liable for a proportionate share of the losses. He was struck by paralysis in the Bengali year 1307, from which time he could not do active work. He, however, continued to be in Calcutta till 1311, when he left Calcutta and went away to his home at Urapara. Our clients have all along been ready and willing to have the accounts duly taken up to the time that your client retired from Calcutta. Your client as the managing *gomasta* has to make up and explain the accounts up to that time. Our clients will offer every facility in the matter of the adjustment of accounts. It is not the fact that your client retired on the 27th June, 1910. He ceased to do active work in 1307 and retired in 1311. Our clients have no recollection of any notice from Messrs. Dutta and Guha. Our clients are ready to pay to your client whatever may be found due on an adjustment of the accounts up to 1311."

Now, as I read that letter, that contains three material statements: it contains a statement that the plaintiff was *gomasta* of the defendants: the second statement is that he was employed up to 1311 B. S. (corresponding with 1904-5), and no longer, and the third statement is that the defendants were willing and ready to pay to the plaintiff whatever might be found due to him on an adjustment of the accounts up to 1311. Now, what is the claim of the plaintiff in this case? He brought his suit in order to establish his right to have the accounts taken upon the basis that he was a partner, and that he was entitled to have the accounts taken down to June 1910. The defendants' solicitors wrote that he was not a partner and that he was not entitled to have the accounts taken up to 1910, but that he was only entitled to have the accounts taken up to 1311 B. S. (corresponding with 1904-5). I cannot understand how that can be taken to be an acknowledgment of the right which the plaintiff was endeavouring to substantiate in his plaint. I can understand it being said and argued with considerable force that it was an acknowledgment of some part of the plaintiff's claim, inasmuch as his claim was to have the accounts taken up to June 1910, and inasmuch as the defendants admitted that he was entitled to have the accounts taken up to 1904-05: To that extent it is an acknowledgment, but in my judgment it is not an acknowledgment of the right alleged by the plaintiff, namely that he was entitled to have the accounts taken up to June, 1910. Inasmuch as the learned counsel for the appellants stated that they are willing that the accounts should be taken between the plaintiff and the defendants, upon the basis of the plaintiff being a partner in the firm down to the end of the Bengali year 1311, this Court will make an order

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that the accounts should be taken between the parties upon that basis.

The result is that this appeal is allowed ; and we direct that an account be taken upon the basis of the partnership up to the end of the Bengali year, 1311.

As regards costs, the appellants will have the costs of this appeal, but each party will pay his own costs of the suit in the Court of first instance.

The decree of the Court of first instance will therefore be varied by substituting the words "end of the Bengali year 1311" for the words twenty-seventh day of June one thousand nine hundred and ten" (in line 25 of the decree at page 36 of the paper-book), and also by substituting the words "each party do pay his, her, or their own costs of this suit" for the words "the adult defendants personally and the infant defendant out of the assets of the said partnership firm do pay to the plaintiff her costs of this suit (to be taxed by the Taxing officer of this Court on scale No. 2) with interest thereon at the rate of six per cent. per annum from the date of taxation until realization.." The rest of the decree will stand.

Mookerjee, J.—I agree that the decree made by Mr. Justice Greaves cannot be supported.

The plaintiff, who has died during the pendency of this litigation, instituted the suit on the 8th February, 1913, for reliefs on the allegation that he was a partner in the firm of Dwarikanath Makhan Lal Saha and that as he contributed labour and skill but no capital, he was, as arranged amongst the partners, entitled to receive $\frac{1}{8}$ th share of the profits and bound to bear $\frac{1}{8}$ th share of the loss arising from the business. He further alleged that he had terminated his connection with the firm by notice to the other partners on the 27th June, 1910. He accordingly asked for a declaration that he had retired from the firm on the 27th June, 1910, and that so far as he was concerned, the partnership had come to an end and was dissolved at that time. On this basis, he prayed for an order that accounts be taken to ascertain what amount was due to him as his share of the profits of the firm at the time of his retirement, and that the defendants do pay him the sum so ascertained. The defendants, in their written statement, raised substantially four grounds of objection. They contended, first, that the suit was defective in form as one of the original partners, Benimadhub Shah Chowdhury, had died in 1895 and his representative had not been added as a party ; secondly, that the plaintiff was not a partner as he alleged but a servant ;

thirdly, that his connection with the business had terminated, not in 1910 as he alleged; but during the year 1904-5; and, fourthly, that the claim was barred by limitation. The plaintiff thereupon applied to the Court on the 12th February, 1914 to add the representative of the deceased partner as a defendant. The result was that under section 22 of the Indian Limitation Act, the suit had to be regarded as instituted on the 12th February, 1914, as against the added defendant, and, if, as against him, the suit had to be dismissed on the ground of limitation, it was bound to fail as against the other defendants as well, because obviously no accounts could be directed in respect of a partnership business in the absence of one of the partners. Consequently, at the trial, the plaintiff found himself in a position of considerable embarrassment and so he asked for and obtained leave to amend the plaint by the insertion of two paragraphs. One of these paragraphs recited that the suit was saved from the bar of limitation by reason of the acknowledgment contained in four letters which had passed between the parties before the institution of the suit. The second paragraph recited that the proper period of limitation was 6 years from the time that the plaintiff retired from the partnership business. There was no prayer for amendment in any other respect, though the minutes show that the plaintiff indicated that further amendment might possibly be necessary. The case then proceeded to trial on the assumption that the plaintiff was a partner and had retired on the 27th June, 1910, as alleged by him, and the question was argued whether the suit was barred by limitation.

On behalf of the defendants, reliance was placed upon Art. 106 of the Indian Limitation Act and it was contended that as more than three years (calculated from the date of retirement of the plaintiff) had expired on the 12th February, 1914, when the suit must be deemed to have been instituted, it was obligatory upon the Court under section 3 to dismiss the suit. The plaintiff replied that article 120 which provides for a period of six years, was applicable, and that if this contention failed, section 19 saved the suit from the bar of limitation. Mr. Justice Greaves has come to the conclusion that Art. 106 was not applicable and that the case was governed by article 120. In this view he has not discussed the question of the applicability of section 19.

On the present appeal, Mr. Das has contended on behalf of the defendants appellants that article 106 is applicable and that the suit is obviously barred by limitation. On behalf of the respondent, Mr. Mitter has not seriously contested this position, but he has

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argued that section 19 saves the suit from the bar of limitation. He has also prayed that the plaintiff might be allowed at this stage to amend the plaint, on the footing that he was not a partner, as asserted by him in the third paragraph of his plaint, but a servant as alleged by the defendants in the first paragraph of their written statement.

It is convenient to consider the application for amendment at the outset.

In my opinion, the plaintiff should not be allowed to amend the plaint in the manner proposed at this stage of the litigation. It is well-settled that where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation. This rule is only one aspect of the broader principle that leave to amend should be refused where the amendment would introduce a totally different, new, and inconsistent case. Here the plaintiff came into Court deliberately on the allegation that he was a partner of the firm along with the defendants. The defendants denied that he was at any time a partner and asserted that he was a servant. The case has proceeded to trial on these pleadings, the plaintiff has succeeded, and has got a decree for accounts on the footing that he was a partner. He cannot now be permitted to abandon that decree, to discard the fundamental allegation made in the plaint, to adopt as the foundation of his claim the allegation made by the defendants in their written statement, and to seek relief on the basis thereof. There are further two weighty reasons why the application should be refused as made at a very late stage of the proceedings. In the first place, if the plaintiff were now to institute a suit on the allegation that he was a servant, it would be successfully met by the plea of limitation. It is not necessary to hold as the Allahabad High Court has done in the cases of *Balkaran Upadhyaya v. Gaya Din* (1), and *Muhammad Sadiq v. Abdul Majid* (2), that the Court is not competent to allow an amendment of the plaint so as to introduce a cause of action which at the moment is barred by limitation. But it is plain that the Court would be very reluctant to deprive the defendants in this manner of a valuable right which they have already acquired by the operation of the statute of limitation. See *Seward v. N. M. T. Co.* (3), and the observations of Lopes L. J. in *Weldon v. Neal* (4). This clearly is not a

(1) (1914) I. L. R. 36 All. 370.

(2) (1911) I. L. R. 33 All. 616.

(3) (1885) 16 Q. B. D. 178.

(4) (1887) 19 Q. B. D. 394.

case where the other side can be compensated by award of costs, which has been described by Bowen L. J. as the one panacea which heals every sore in litigation: *Cropper v. Smith* (1). In the second place, the plaintiff has died during the pendency of the litigation, and we can no longer have his testimony which would have been of primary importance upon the question of his status. On these grounds, I hold that the application for amendment should not be entertained. Two questions, consequently, require examination namely, first, is Art. 106 or 120 of the Indian Limitation Act applicable to this case? and secondly, if Art. 106 is applicable, does section 19 assist the plaintiff, and if so, to what extent?

Art 106 provides that "a suit for an account and share of the profits of a *dissolved partnership* must be instituted within three years from the date of dissolution." What then is the true meaning of the expression "dissolved partnership?" The defendants contend that this has reference to a partnership which, so far as the plaintiff is concerned has been dissolved; in other words, the suit contemplated by Art. 106 is brought by a plaintiff who has ceased to be a member of the partnership and has consequently become entitled to claim an account, and a share of the profits. The plaintiff contends, on the other hand, that if the partners other than the partner who has retired, carry on the business, there is no "dissolved partnership" within the meaning of the article. In my opinion, the interpretation suggested by the defendants gives effect to the true intentions of the Legislature, as is clear from the provisions of the Indian Contract Act relating to the dissolution of partnerships [sections 239, 253 (7) and (8).] In the case before us, the plaintiff alleges that he retired from the partnership on a specified date; he seeks a declaration that in so far as he is concerned the partnership was dissolved on that date. It is obviously immaterial whether the business was or was not carried on after his retirement by the other members; for, if it was so carried on, it was not a partnership in which he was interested as a partner. From this point of view, Art. 106 is obviously applicable: *Ahinsa Bibi v. Abdul Kader Sahab* (2), and *Sudarsanam Maistri v. Narasimhulu Maistri* (3). In the second of these cases Mr Justice Bhashyam Ayyangar formulates the law in terms with which I find myself in complete agreement "From the year 1894, the plaintiff ceased to be a member of the alleged partnership (*vide* section 253,

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(1) (1884) 26 Ch. D. 700.

(2) (1901) I. L. R. 25 Mad. 26.

(3) (1901) I. L. R. 25 Mad. 149.

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clause 7 of the Indian Contract Act) and, in fact, he retired from the partnership which had not been entered into for any fixed term (clause 8 of section 253, Indian Contract Act). It is, therefore, clear that the present suit, viewing it as one for winding up the affairs of the partnership which terminated or was dissolved in 1894, is barred by the law of limitation. The fact that after retirement of one of two partners, the remaining partner carries on the same business makes no difference: *Knox v. Gye* (1). The case of *Noyes v. Crawley* (2) cited on behalf of the respondent is in point and Vice-Chancellor Malins expresses his full concurrence in the following statement of the law by Lord Lundley in his treatise on Partnership—"so long, indeed, as a partnership is subsisting and each partner is exercising and enjoying his own property, the statute has, it is conceived, no application at all; but as soon as a partnership is dissolved or there is any exclusion of one partner by others, the case is very different and the statute begins to run." The same learned author, on the authority of *Pierce v. Lindsay* (3), says that a dissolution of a partnership at will may be inferred from circumstances. Having regard to the above authorities and clauses 7 and 8 of section 253 of the Indian Contract Act, it is impossible to accede to the contention of the learned Advocate-General that there has yet been no dissolution of the alleged partnership between the plaintiff and the first defendant and that therefore the suit is not barred by Art. 106 of the Indian Limitation Act." The view attributed to Lord Lundley was emphasised by him in the case of *Beijemaun v. Beijemaun* (4). There a partnership had been carried on by three persons A, B and C. Of these A died, with the result that the partnership was determined by that event. The question arose whether the partnership which was subsequently carried on by B and C was the original partnership or a new partnership: Lord Lundley held that the two sons continued the partnership but it was in point of law a different partnership, namely a partnership between the two: See also *Barton v. North S. Ry. Co.* (5); *Miller v. Miller* (6). I hold accordingly that on his retirement, the plaintiff ceased to be a member of the firm, that in so far as he was concerned the partnership was then dissolved, and that time must run under Art. 106 against him from that date. In this view, the claim was *prima facie* barred on the 12th February 1914, when the suit must be deemed to have been instituted. This renders necessary an

(1) (1871-2) L. R. 5 H. L. 656.

(2) (1878) 10 Ch. D. 31 (39).

(3) (1860) 3 DeG. J. and Sm. 139.

(4) (1895) 2 Ch. 474 (477).

(5) (1888) 38 Ch. D. 458.

(6) (1869) L. R. 8 Eq. 499.

examination of the effect of section 19 of the Indian Limitation Act.

Section 19 of the Indian Limitation Act,—I quote only so much thereof as is applicable to this case—provides that where before the expiration of the period prescribed for a suit in respect of any right an acknowledgment of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Reliance is placed in this connection upon a letter dated the 21st January, 1913 in which the defendants admitted that they were liable to render accounts to the plaintiff up to the year 1904-5, and at the same time stated specifically that the plaintiff retired in 1904-5 and not on the 27th June, 1910 as he alleged. This letter consequently does embody an acknowledgment (given within three years from the 27th June, 1910, when the partnership was dissolved), of the right of the plaintiff to have an account of the profits of the firm from the defendants down to the year 1904-5. But it does not go further. I cannot accede to the contention that as there was a liability to account, if the liability was admitted in part, the right was saved in its entirety. No authority has been mentioned which sustains the view that there cannot be an acknowledgment of a part of the right claimed. The decision in *Brands v. Simpson* (1), undoubtedly does not support this broad proposition and is clearly distinguishable. On the other hand, the decision of the Judicial Committee in *Maniram Seth v. Seth Rupchand* (2), where reference is made in terms of approval to the Judgment of Mellish, L.J. in *In Re River Steamer Co. v. Mitchell's Claim* (3), points to a different conclusion. Mellish, L.J. held that an acknowledgment to take a case out of the statute of limitation must be, first, one from which an absolute promise to pay can be inferred or secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed. Consequently, the effect of the acknowledgment must depend, in each case, upon the nature of the particular right claimed and the terms of the acknowledgment. In this case, there was an unconditional promise to pay whatever might be found due upon accounts taken, down to the year 1904-5, coupled with an express denial of liability to account for the subsequent period. I hold accordingly that section 19 saves

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(1) (1854) 1 Kay 678.

(2) (1906) I. L. R. 33 Calc. 1047 ; L. R. 33 I. A. 165 ; 4 C. L. J. 94.

(3) (1871) L. R. 6 Ch. App. 822.

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that portion only of the claim which is admitted in the letter. The appeal must accordingly be allowed and the decree modified to the extent indicated.

Messrs. B. N. Basu & Co. :—Attorneys for the Appellants.

Mr. T. B. Roy :—Attorney for the Respondents.

A. T. M.

Appeal allowed : Decree modified.

APPELLATE CIVIL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, Mr.
Justice Teunon and Mr. Justice Walmsley.*

KUMAR CHANDRA KISHORE ROY CHOWDHURY

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*Revision—Civil Procedure Code (Act V of 1908), Sec. 115 (c)—Charter Act,
cl (15)—Mistake of fact—Wrong decision based thereon—‘Superintendence’—
Appeal, if lies.*

The respondents' landlord obtained a decree for rent against them, and in execution of that decree he caused respondents' share in a putni taluk to be put up for sale. The share was two-thirds of the taluk. In the sale, the share was bought by the owner of the remaining one-third share. Subsequently the respondents applied to have the sale set aside, and this application was granted by the Munsif. On appeal to the District Judge by the auction-purchaser, the order setting aside the sale was reversed and the sale was confirmed. The learned District Judge in appeal stated that the property sold was one-third share and he also considered the purchaser to be a "new comer." Thereupon the judgment-debtor preferred a motion in the High Court; a Rule was issued, and in due course the Rule came on for hearing before a Division Bench. The senior Judge held that the case was one in which it was right to interfere and directed that the appeal should be heard again by the District Judge. The other Judge however was of opinion that the circumstances were not such as to bring the case within the scope of section 115 of the Code of Civil Procedure. The auction-purchaser then lodged an appeal against the order of the senior Judge :

Held, that an appeal lay under clause 15 of the Letters Patent against the order of the senior Judge, as his judgment was one which deprived the auction-purchaser of the benefit of the District Judge's judgment, which confirmed the sale and consequently it was a judgment which materially affected the merits of the question between the parties.

*Letters Patent Appeal No. 5 of 1916, against the decision of Mr. Justice N. R. Chatterjee, dated the 9th April, 1915, in Civil Rule No. 1145 of 1914.

Held also (Teunon J. contra). A mistake of fact and a wrong decision based on it, did not constitute illegality or irregularity within the meaning of cl. (c) of section 115 of the Code of Civil Procedure. The High Court could not interfere with the decision of the learned District Judge neither under cl. (c) of section 115 of the Code of Civil Procedure, nor under clause 15 of the Charter Act.

Shew Prosad v. Ram Chunder (1); *Krishna Mohini v. Kedarnath* (2) and *Amir Hassan v. Shoo Baksh* (3) followed.

That the High Court could not interfere under section 115 of the Code of Civil Procedure as the judgment-debtor had his remedy in review of judgment.

Held further (Teunon J. expressing no opinion). The word 'superintendence' in clause 15 of the Charter Act should be construed very narrowly.

Appeal by the Auction-purchaser.

Application to set aside execution sale.

The primary Court set aside the sale but the order was reversed on appeal. Against that order an application was made under section 115 of the Code of Civil Procedure and clause 15 of the Charter Act

The following judgments were delivered :

N. R. Chatterjea, J.—The petitioner in this case was the owner of a two-thirds share of a patni tenure, the remaining one-third of which belongs to the auction-purchaser, opposite party. In execution of a decree for arrears of rent obtained by the zemindar, the two-thirds share of the petitioner was sold, and was purchased by the auction-purchaser, opposite party for Rs. 2755. The petitioner applied to have the sale set aside on the ground that the property was worth not less than Rs. 6,000, and that there were irregularities in publishing the sale which resulted in substantial injury to him.

The Court of first instance found upon the evidence, that the value of the property had been deliberately understated in the sale proclamation at Rs. 600; that the sale proclamation was not duly published, that there were no bidders except the decree-holder and the auction-purchaser, and that the property was valuable and might be worth Rs. 6,000 as alleged by the judgment-debtor.

That Court came to the conclusion that "it is no wonder that the sale proclamation being not duly published, and there being deliberate mis-statement as to the value in the sale proclamation, the disputed property was sold away for the inadequate price to the

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(1) (1913) I. L. R. 41 Calc. 323 (338).

(2) (1888) I. L. R. 15 Calc. 446 (449).

(3) (1884) I. L. R. 11 Calc. 6.

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detriment of the judgment-debtor," and accordingly set aside the sale.

With regard to the under-statement of value in the sale-proclamation, the learned District Judge on appeal observed :—"There is no sufficient reason for supposing that the natural effect of such a statement was to choke off likely bidders, unless one can seriously take the view that the statement must have operated as a deterrent to persons who would otherwise have been prepared to bid, the circumstance that it was not strictly accurate cannot be regarded as a material irregularity." This view is clearly opposed to that taken by the Judicial Committee in the case of *Saadatmand Khan v. Phul Kuar*, (1) where their Lordships observed : "It is indeed something more than the kind of irregularity which is commonly alleged, for it is a mis-statement of the value of the property which is so glaring in amount that it can hardly have been made in good faith, and which however it came to be made, was calculated to mislead possible bidders, and to prevent them from offering adequate prices or from bidding at all." In the present case the amount for which execution was taken out appears to have been Rs. 1447-5-9 plus Rs. 129-15-0 on account of costs, and the property was valued at Rs. 600 in the sale-proclamation.

The property was sold for Rs. 2755, and I do not understand what the learned Judge means by saying that the statement as to the value in the sale-proclamation was not "strictly accurate." However that may be the learned Judge did not come to a finding as to whether there was a deliberate mis-statement as to value in the sale proclamation as found by the Court of first instance.

As regards the question whether the sale-proclamation was duly published, he made certain observations, and concluded as follows :—"The fact that there may have been a certain want of formality about the manner of publishing the sale-proclamation does not in my opinion warrant the conclusion that publicity, the proclamation is designed to secure, had not been attained with the consequence that the result of the sale has been appreciably affected," but he has not come to a definite finding whether the sale proclamation was duly published according to law.

The Court of first instance came to clear findings that the value of the property had been deliberately mis-stated in the sale proclamation, and that the sale proclamation was not duly published. Either of which would constitute a material irregularity in publishing the sale, and the learned District Judge has acted with material irre-
(1) (1898) I. L. R. 20 All 412.

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gularity in reversing the order of the lower Court without coming to definite findings on the said points. But then, he has found that the price fetched at the sale was not inadequate and if that is so, it would be immaterial whether there were irregularities in publishing the sale. In arriving however at the conclusion as to the price fetched at the sale, the learned Judge started with a misconception on a fundamental point. The property sold, as already stated, was two-thirds of a *putni* taluk. The learned District Judge starts with the idea, that what was sold was one-third of the *putni* taluk. It cannot be said that the words 'one-third' was a mere slip. The learned Judge begins his judgment by saying that, "the property sold was one-third share of a *putni* taluk" and further on says "I can find no substantial ground for the view that the property sold could be expected to fetch very much more than Rs. 2755 at a public sale. It consists as already stated of a one-third share of a *putni*." Then he discussed the question whether the Court of first instance was right in holding that Rs. 6,000 was the value of the property, and observed as follows:—"The lower Court's estimate of Rs. 6,000 as the approximate value of the property is based solely upon a statement of the judgment-debtor himself. He does not furnish any of the data which lead to this result except that the *putni* comprises six hundred bighas and yields him an income of Rs. 400. But nothing is said of any possible drawbacks in the shape of difficulties that may intrude themselves in the way of a new comer to prevent him from getting the full benefit of his purchase. But this is the sort of risk, that any would-be purchaser—not already interested in the property as the appellant is—would have to take into account in deciding what it was worth his while to pay for it." The appellant before that Court, viz., the auction-purchaser was however, not a "new-comer" or "a person not already interested in the property" as the learned Judge thought, but was a co-sharer in the *putni* taluk itself to the extent of one-third.

The question is whether under the circumstances, the case comes under the third clause of section 115 of the Civil Procedure Code which speaks of the Court having acted in the exercise of its jurisdiction illegally or with material irregularity.

Now the Court had to decide whether the property sold viz. two-thirds of the *putni* taluk fetched an inadequate price at the sale by reason of certain irregularities, and the Judge started with the idea that the property sold was one-third of the *putni*, and came to a certain decision on that basis.

A proper trial pre-supposes that the Court has no misconception

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about the question to be tried. And if a Judge places the very question for adjudication before him wrongly upon a misconception on a fundamental point and then proceeds to decide such a question there is no proper trial of the case, and in acting in that way, the Court, I think, commits a material error of procedure and acts in the exercise of its jurisdiction, illegally or with material irregularity within the meaning of section 115 of the Civil Procedure Code. I think we have the power to interfere under that section or under section 15 of the Charter Act.

There can be no doubt as to the *bona fides* of the application to set aside the sale, as would appear from the fact that the petitioner deposited the entire decretal amount together with interest and costs due to the decree-holder, and the amount of compensation payable to the auction-purchaser as directed by the Court of first instance before the sale was set aside by that Court.

I am of opinion that we have the jurisdiction to interfere and the ends of justice require that we should interfere in this case. I would, therefore, set aside the order of the District Judge, and remand the case to him for a re-hearing of the appeal in accordance with law.

No order as to costs.

Mullick, J.—I agree that the learned District Judge should have come to a definite finding as to the allegations that the decree-holder had fraudulently undervalued the property and that the sale notices in two of the mouzas had not been served. But the omissions are immaterial because the learned Judge has come to a clear finding that the price realised at the auction was not inadequate. It is admitted that unless this finding can be revised under section 115 Civil Procedure Code, the sale must stand. Now, with very great deference to my learned brother, I do not think, that this is a case to which section 115 can apply. That section has a very limited operation. The learned District Judge had jurisdiction to find that the price was adequate and he has done so. If in arriving at this finding he has committed an error of fact by assuming that the share of the Patni put up to sale was one-third, whereas it was really two-thirds, it cannot be said that he has in any way acted illegally or with material irregularity. Then it is alleged that the learned Judge was in error in saying that the auction-purchaser was a stranger though he was really a co-sharer in that portion of the putni which was not put up to sale. I am not certain whether the Judge was ignorant of the fact that the auction-purchaser had an interest in the

remainder of the putni and whether in using the expression 'new-comer' he did not merely mean that the auction purchaser was not party to the suit. But even if he was really in error on this point, the mistake is one of fact and cannot make section 115 applicable. In the case of *Krishna Mohini Dossee v. Kedarnath Chuckerbutty* (1), the learned Judges in interpreting the ruling of the Privy Council in *Amir Hassan v. Sheo Baksh Singh* (2) said that whenever a Court has jurisdiction to decide a question whether it is a question of law or a question of fact its decision on that question is not revisable by this Court. The case before us is fully covered by the above rule. But it is argued that where a Court in exercising its jurisdiction fails to apply its mind to the question at issue and thereby to hold a proper trial it acts illegally and with material irregularity. Now it is clear that the Court was aware that it had to value a property alleged by the judgment-debtor to measure 600 bighas and to yield an income of Rs. 400 per annum. In my opinion it would be wrong to say that there has been no proper trial of the material issue in the case because the Judge has made a mistake as to the exact proportion which these 600 bighas bear to the whole putni. The Civil Procedure Code makes no distinction in favour of errors which are fundamental errors for the purposes of section 115 and I think any attempt to make such a distinction would lead us into great difficulties. I think therefore that the petitioners' proper remedy was to apply for a review. But as my learned brother, who is the senior Judge of the Bench, holds a different opinion, his view must prevail and the case remanded for re-hearing as directed by him.

Against this decision, the Opposite Party appealed under section 15 of the Letters Patent

Babus Mahendra Nath Ray and Rames Chunder Sen for the Appellant.

Babu Mohini Mohan Chuckerbutty for the Respondents.

Sanderson, C. J.—This is an appeal under section 15 of the Letters Patent arising from a difference of opinion between Chatterjea J. and Mullick J.

The facts are as follows :—

The landlord of the judgment-debtor obtained a decree for rent against him, and in execution thereof, the judgment-debtor's interest in a putni tenure was sold. His interest was a two-third share. At the sale the debtor's interest was bought for Rs. 2755 by Kumar

(1) (1888) I. L. R. 15 Calc 446.

(2) (1884) I. L. R. 11 Calc. 6.

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Chandra Kishore Roy Chowdhury, who was the owner of the remaining one-third share. The judgment-debtor applied under order 21 rule 90 to have the sale set aside: the Munsiff in the Court of first instance set aside the sale on the ground that he was not satisfied that the sale proclamation was duly published, and on the further ground that the price was deliberately understated in the proclamation and that the disputed property was a valuable one and might be worth Rs. 6,000 as alleged by the judgment-debtor.

The auction-purchaser appealed from the order of the Court of first instance and the District Judge allowed the appeal. On the motion of the judgment-debtor, a Rule was issued by the High Court which came on for hearing before Chatterjea J. and Mullick J. Chatterjea J. held that the Court had power to interfere under clause (c) of section 115 of the Civil Procedure Code or under section 15 of the Indian High Courts Act, 1861. On the other hand Mullick J. came to the conclusion that having regard to the limited operation of section 115, the Court had no jurisdiction to interfere; he expressed no opinion as to section 15 of the Indian High Courts Act.

The opinion of the senior Judge prevailing, an order remanding the case was made and a re-hearing was directed: hence this appeal by the auction-purchaser.

The grounds upon which Chatterjea J. based his judgment were:

(1) That the learned District Judge did not come to any finding (a) as to whether there was a deliberate misstatement as to value in the sale proclamation; or (b) as to the publication of the proclamation.

(2) That the learned District Judge started with a misconception on a fundamental point, in that he based his judgment upon the assumption that what was sold was one third share of the *putni* taluk, whereas in fact it was a two-thirds share.

(3) That the learned District Judge assumed that the purchaser was a 'new-comer' whereas he was himself a co-sharer in the *putni* tenure to the extent of one-third.

The question is, whether under the above circumstances the case comes within clause (c) of section 115 of the Civil Procedure Code.

The clause provides as follows:—

115. "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) * * *

(b) * * *

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit "

This clause has been the subject of judicial decision in this Court, *e.g.*, in *Shew Prosad Bungshidhur v. Ram Chunder Haribux* (1), Jenkins C. J. said, "it appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the faults of procedure indicated in that section."

In *Krishna Mohini Dossee v. Kedar Nath Chuckerbutty* (2) Petheram C. J. speaking of section 622 of the Code of Civil Procedure of 1882 which was in terms similar to the section now under discussion said :

"But then comes a very different and more difficult question, and that is the question whether this order can be revised by the Court under section 622 of the Code of Civil Procedure. This is a section which has been a good deal enquired into.

"In our opinion it is a section of very limited operation. What the section says is that the High Court may revise a decision of the Court by which the case was decided if the Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

"Now, it seems to us, that the meaning of this section is that, whenever a Court has jurisdiction to decide a question, whether it is a question of law or a question of fact, its decision on that question is not revisable by this Court."

Both of these decisions were based upon the decision of the Judicial Committee of the Privy Council in *Amir Hassan Khan v. Shro Baksh Singh* (3).

The question therefore is, can it be said that the District Judge acted in the exercise of his jurisdiction illegally or with material irregularity, and having regard to the construction put on clause (c) of section 115, was the failure of justice due to such a fault of procedure as is indicated in this clause.

As regards the misstatement of value in the proclamation as I read the District Judge's judgment, he assumed that there was such a misstatement but he thought it was not a material irregularity.

As regards the alleged want of finding with reference to the

(1) (1913) I. L. R. 41 Calc. 323 (338).

(2) (1888) I. L. R. 15 Calc. 446 (449). (3) (1884) I. L. R. 11 Calc. 6.

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publication of the proclamation, I think that the learned District Judge should have arrived at a definite conclusion on this point, but in view of his finding that the price obtained for the property was adequate, this matter was apparently considered by him as of no material importance to his judgment. As regards his misconception as to what was sold, and as to the position of the auction-purchaser, the learned Judge made a grave mistake of fact.

The learned Judge, however, had jurisdiction to decide all these questions, and if he made a mistake as to law or fact this Court can not interfere by way of revision. He had to decide whether the price obtained for the property was adequate. To arrive at a conclusion thereon he would naturally first have to decide what was the plaintiff's interest in the *pulni* taluk and whether the purchaser was a person who would pay a fair price. He stated that the property sold was a $\frac{1}{3}$ rd. share; and therein he made a grave mistake, as the plaintiff's interest was a $\frac{2}{3}$ rd. share: he also considered the purchaser to be a "new comer" whereas he was himself a co-sharer.

These are questions which in my judgment the learned Judge had jurisdiction to decide, and although he made grave mistakes of fact, upon which he based his judgment, with respect to these matters, in view of the construction placed upon the section in the above-mentioned cases, with which I agree, his decision is not revisable by this Court. It may be noted that he judgment-debtor was not without a remedy: he could have applied to the learned District Judge for a review and if the attention of the learned Judge had been drawn to the serious mistake of fact which he had made, it is almost impossible to believe that the application for review would have been refused.

As regards the contention that this Court has power to interfere under section 15 of the Indian High Courts Act 1861, having regard to the circumstances of this case, in my judgment this Court has no such power.

There was no right of appeal from the order of the District Judge, and, in my opinion, as already stated under the circumstances of the case, this Court has no jurisdiction under section 115 of the Civil Procedure Code to revise the judgment of the District Judge; if this Court were to interfere, basing its interference upon the powers conferred by section 15 of the Indian High Courts Act, it would in my judgment be straining the meaning of the word "superintendence" unduly. It would mean that although there was no right of appeal and no power to revise under section 115 of the Code this Court could by exercising its power of "superintendence" in effect

hear an appeal, or act in revision. I am not prepared so to hold, and indeed it is not necessary to put upon the section in question any such strained meaning, because, as already stated, here was an obvious remedy available to the judgment-debtor, viz., by way of review, by means of which the unfortunate mistake could have been put right.

A preliminary point was taken that there was no right of appeal: In my judgment an appeal lies on the ground that Chatterjea J's judgment was one which deprived the auction-purchaser of the benefit of the District Judge's judgment, which confirmed the sale, and consequently it was a judgment which materially affected the merits of the question between the parties.

For these reasons, in my judgment, the appeal should be allowed with costs both in this Court and before Chatterjea and Mullick JJ., the Rule should be discharged and the order directing a rehearing should be set aside.

We assess the hearing-fee at two gold mohurs for each hearing in this Court.

Teunon, J.—This is an appeal under article 15 of the Letters Patent against the decision of Mr. Justice Nalini Ranjan Chatterjea.

By his decision he sets aside an order of the District Judge of Dinajpur and remands the case in which the order was made for rehearing.

A preliminary objection was taken that against the decision of Mr. Justice Chatterjea no further appeal lay under article 15 of the Letters Patent. On this point I agree with the decision of this Court in *Behari Lal Shaha v. Jnanendra Nath Bhattacharjee* (1), (though that was an appeal against a judgment in 2nd appeal) and therefore, this objection, in my opinion, cannot be sustained.

The appeal arises out of an application made by the judgment-debtor under the provisions of the Code of Civil Procedure, order 21, rule 90 for the setting aside of a sale in execution.

The property sold was the judgment-debtor's two-third share in a certain Putni Taluk. The trial Court held that in the sale proclamation the value of the property had been deliberately underestimated, that the sale proclamation had not been duly published and that by reason of these irregularities or frauds an inadequate price had not been realised.

Against the order setting aside the sale on the grounds just stated the auction-purchaser appealed. The District Judge at the hearing of the appeal came to no clear finding as to the publication of the
(1) (1917) 21 C. W. N. 921.

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sale proclamation, held that the statement of value (Rs. 600) though a gross misstatement was not calculated to deter possible bidders, and that the price fetched at the sale (Rs. 2,755) was not seriously inadequate. He therefore decreed the appeal.

Against this decision there was an application in revision to this Court. At the hearing of the Rule then obtained it was contended that the District Judge had failed to value the property sold, namely, the judgment-debtor's two-third share in a certian Putni Taluk.

His judgment in fact makes it apparent that he conceived that he was required to value a one-third share. Moreover his judgment indicates that he has fallen into a further error regarding the area, that is, he appears to think that the judgment-debtor's statement of area, 600 bighas, applies not to his own share (two-thirds) but to the whole Putni of which the Judge therefore proceeds to value one-third i.e., 200 bighas. The learned Judges who heard the Rule differed, Mr. Justice Mullick, who has himself apparently misapprehended the District Judge's statement regarding area, holding that the error committed by the District Judge did not bring the case within the scope of section 115 of the Code while the senior Judge, Mr. Justice Chatterjea, was of opinion that under section 115 of the Code, and also under section 15 of the Charter Act, the Court could and should interfere.

Against the latter's decision the present appeal has been preferred by the auction-purchaser.

At the hearing before us, it has been contended on behalf of the appellant that the error into which the District Judge has fallen is merely one of those erroneous decisions or "sad mistakes" to which the case of *Amir Hassan v. Sheo Baksh* (1), decided by their Lordships of the Judicial Committee, and the case of *Shew Prosad v. Ram Chunder* (2) should be held to apply.

To this contention I am unable to assent.

It may be that if the parties had been in dispute as to the judgment-debtor's interest in the putni and if, however erroneously, the District Judge had decided that his interest was not two-third but one-third (and the area not 600 bighas but 200 bighas) this would have been merely an erroneous decision on a question of fact with which acting under section 115 of the Code we could not and should not interfere.

But the case here appears to me to be different. The property sold was clearly specified in the sale proclamation as the judgment-debtor's two-third share. As to the extent of the judgment-debtor's

(1) (1884) I. L. R. 11 Calc. 6.

(2) (1913) L. L. R. 41 Calc. 323.

interest there was no dispute between the parties. Specified shares are distinct entities. It is the duty of a Judge to decide *secundum allegata probata*. Instead of doing so the learned Judge here has set himself to value not the property sold but an entirely different property and on his finding as to the value of this different or imaginary property he has declined to set aside the sale of the judgment-debtor's property valued by the judgment-debtor at more than double the price realised.

By way of analogy merely, I should refer, in support of the view I take, to two cases decided by the Bombay High Court: *Gorakh v. Vithal* (1), and *Venkubai v. Lakshman* (2).

For these reasons and differing with all respect from my learned colleagues I am of opinion that the present appeal should be dismissed with costs.

Walmsley J.—This appeal is against an order passed by Mr. Justice Chatterjea on an application made by the present respondent.

The circumstances are as follows :

The respondents' landlord obtained a decree for rent against him, and in execution of that decree he caused respondents' share in a *putni* taluk to be put up for sale. The share was two-thirds of the taluk. In the sale, the share was bought by the owner of the remaining one-third share, subsequently the respondents applied to have the sale set aside, and this application was granted by the Munsiff. Then the auction-purchaser preferred an appeal, and the order setting aside the sale was reversed and the sale was confirmed. Thereupon the judgment-debtor preferred a motion in this Court; a Rule was issued, and in due course the Rule came on for hearing before Mr. Justice Chatterjea and Mr. Justice Mullick. The former held that the case was one in which it was right to interfere and directed that the appeal should be heard again by the District Judge. The latter, however was of opinion that the circumstances were not such as to bring the case within the scope of section 115 of the Civil Procedure Code. The auction-purchaser has lodged this appeal against Mr. Justice Chatterjea's order directing that the appeal should be re-heard.

A preliminary objection was taken at the hearing by the learned pleader for the respondent to the effect that no appeal lay: and he referred to the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* (3) I do not think that that case supports his

(1) (1887) I. L. R. 11 Bom. 435.

(2) (1887) I. L. R. 12 Bom. 617.

(3) (1872) 8 B. L. R. 423 (452).

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argument. The learned Chief Justice said there 'we think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability.' Applying that definition to Mr. Justice Chatterjea's judgment, it is clear that it affects the merits of the question in a very material degree. The effect of the decision by the lower appellate Court was to confirm the sale: but by Mr. Justice Chatterjea's order the Munsiff's order setting aside the sale is restored until the auction-purchaser has convinced the District Judge at a second hearing of the appeal that it ought to be reversed. I hold, therefore, that the preliminary objection cannot be sustained and that the appeal does lie.

For the appellant it is urged that the reasons given by Mr. Justice Chatterjea cannot be brought within any of the clauses of section 115, Civil Procedure Code. It is clear that clauses (a) and (b) have no application. Can it be said that the learned District Judge "acted in the exercise of his jurisdiction illegally or with material irregularity?" The learned pleader for the respondent says that because the lower appellate Court treated the property as being one-third of the taluk instead of two-thirds, there was no proper trial of the case. He stated this argument in several ways: that the learned Judge did not apply his mind to the case really before him; that he decided a case about the one-third share and not about the two-thirds share; that he did not try the judgment-debtor's case at all. Stated in any form, the argument is, if I may use the epithet without offence, nothing but a specious way of saying that the learned Judge made a very serious mistake regarding the extent of the interest which had been sold. A mistake of fact, however, and a wrong decision based on it, do not constitute illegality or irregularity. I think this view is in accordance with a recent decision of this Court, *Shew Prosad Bungshidhur v. Ram Chunder Haribux* (1) and with a decision by their Lordships of the Privy Council, *Amir Hassan Khan v. Sheo Baksh Singh* (2). In my opinion, therefore, the present case does not come within the scope of section 115, Civil Procedure Code.

For the respondent it is urged that if he cannot obtain relief under section 115, Civil Procedure Code at any rate the provisions of section 15 of the High Courts Act are wide enough to cover his case. Attempts are often made to put an elastic interpretation upon the word 'superintendence.' Personally I think the word should be construed very narrowly. It is not necessary, however, to consider what meaning should be given to it, for there is one fact in the

(1) (1913) I. L. R. 41 Calc. 323.

(2) (1884) I. L. R. 11 Calc. 6.

present case which prevents the respondent from asking us to go beyond the provisions of the Civil Procedure Code. That fact is his failure to apply to the lower appellate Court for a review of judgment. It is clear that the respondent was "aggrieved by a mistake apparent on the face of the record" and if he had made a proper application under order XLVII he would, doubtless, have obtained relief.

Although I share Mr. Justice Chatterjea's sympathy for the judgment-debtor, I think we cannot uphold his order. In my opinion the appeal should be allowed, the order directing the appeal to be re-heard by the District Judge should be set aside, and the Rule obtained by the judgment-debtor should be discharged. I therefore concur in the orders of the learned Chief Justice.

A. T. M.

Appeal allowed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

BHARAT RAMANUJ DAS MAHANTA

ISHAN CHANDRA HALDAR AND OTHERS.*

Mortgage—Mortgagee, purchaser of equity of redemption—Purchase in execution of money decree—Mortgagee, if trustee.

A mortgagee can purchase an equity of redemption at a sale held in execution of a money decree obtained by a stranger against the mortgagor. He does not hold the equity of redemption as a trustee for the mortgagor and for his benefit.

Erusappa v. Commercial and Land Mortgage Bank Ltd. (1) dissented from, Appeal by the Plaintiff.

Suit for redemption of an usufructuary mortgage.

The material facts and arguments appear from the judgment.

Rabus Ram Chunder Mazumdar, Mohini Mohan Chatterjee and Jnanendra Nath Dutt for the Appellant.

* Appeal from Appellate Decree No. 2172 of 1915, against the decree of C Twidell Esq., District Judge of Bankura, dated the 4th June, 1915, affirming that of Babu Kishori Mohan Bose, Munsiff of Khatra, dated the 4th June, 1914.

(1) (1899) I. L. R. 23 Mad. 377.

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Babus Mahendra Nath Ray and Manmatha Nath Ray for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiff in a suit for redemption of an usufructuary mortgage, dated the 11th July, 1881. On the 20th August, 1884, the equity of redemption was sold in execution of a money decree against the mortgagor, and was purchased by the mortgagee. On the 11th May, 1907, the plaintiff took a conveyance of the equity of redemption from the heirs of the mortgagor, and on the 19th May, 1913, instituted this suit for recovery of possession upon redemption. The Courts below have dismissed the suit on the ground that the plaintiff, by his purchase, has not acquired title to the equity of redemption and cannot claim to redeem the mortgage. The plaintiff appellant has controverted this view and has argued that the mortgagee, by his purchase of the equity of redemption on the 20th August, 1884, did not acquire an irredeemable title, but became a trustee for the benefit of the mortgagor and might be called upon to submit to redemption. In support of this view, reliance has been placed upon the decisions in *Erusappa Mudalliar v. Commercial and Land Mortgage Bank Ltd.* (1), and *Pancham Lal Chowdhry v. Kishun Pershad Misser* (2).

The first of these cases apparently assists the contention of the appellant, but we are unable to accept as well-founded the rule of law enunciated therein. We cannot affirm the proposition that whenever a mortgagee purchases the equity of redemption at a sale held in execution of a money decree obtained by a stranger against the mortgagor, the mortgagee holds the equity of redemption as trustee for the mortgagor, and for his benefit. Neither principle nor authority supports this comprehensive proposition, which has, indeed, been expressly repudiated in the cases of *Sesha Ayyar v. Krishna Ayyangar* (3); *Kutlan Nayar v. Krishnan Mussa* (4), and *Ekkotha v. Chakkiamma* (5). We are further of opinion that the broad rule formulated on behalf of the appellant is contrary to the decision of the Judicial Committee in *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan* (6), where the judgment of Knight Bruce L. J. in *Shaw v. Bunney* (7), was quoted with

(1) (1899) I. L. R. 23 Mad. 377.

(2) (1910) 14 C. W. N. 579.

(3) (1900) I. L. R. 24 Mad. 96.

(4) (1902) 12 M. L. J. 390.

(5) (1903) I. L. R. 27 Mad. 428.

(6) (1879) L. R. 6 I. A. 145; I. L. R. 5 Calc. 198.

(7) (1864) 33 Beav. 494; 2 DeG. & S. 468; 139 R. R. 190.

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Mookerjee, J.

approval. The question raised before the Judicial Committee was, whether, when a landed estate has been twice mortgaged by the owner, so that there are several distinct mortgages not connected with each other, one first, the other second, and the first mortgagee having a power of sale duly exercises it, the second mortgagee becoming the purchaser, such a state of things prevents him from acquiring by means of the purchase that absolute and irredeemable title against the mortgagor which a stranger making the purchase would have acquired. The question thus formulated was answered in favour of the mortgagee purchaser, and it was ruled that, in the absence of special circumstances to show that the second mortgagee had availed himself of his position as a mortgagee to procure some facility or advantage leading to the purchase or connected with it, he is precisely in the same position as a stranger purchaser. See also *Kirkwood v. Thompson* (1). This view is in accord also with the decision of the Judicial Committee in *Khiarujmal v. Daim* (2). That case is not an authority for the proposition that a mortgagee is under a disability to purchase the equity of redemption brought to sale at the instance of a stranger decree-holder, although the position might be different if the mortgagee himself acquired the equity of redemption at an execution sale held at his instance in contravention of the rule enunciated in section 99 of the Transfer of Property Act.

As regards the judgment in *Pancham Lal Chowdhury v. Kishun Pershad Misser* (3), we are not unmindful of the dictum it contains, namely, that, as an established proposition of law, the purchase of the equity of redemption constitutes the mortgagee the trustee for the mortgagor. This observation, however must be limited to the circumstances of the particular case then before the Court namely, the case of a purchase by the mortgagee in contravention of the provisions of section 99 of the Transfer of Property Act.

We are clearly of opinion that the suit has been rightly dismissed by the Courts below, as at the date of its institution, the plaintiff had no interest in the equity of redemption, which had finally vested in the mortgagee on the 20th August, 1884.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1865) 2 H. & M. 392.

(2) (1904) I. L. R. 32 Calc 296

(3) (1910) 14 C. W. N. 579.

CRIMINAL REVISION.

Before Mr. Justice Richardson and Mr. Justice Beachcroft.

CRIMINAL.

1917.

November, 28.

MANHARI CHOWDHURY

v.

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898), Sec. 403—Theft—Calcutta Police Act (IV B. C. of 1866 as amended), Sec. 54A.

The petitioner, a dealer in jute, was found in possession of certain bales and half bales of jute. With reference to that jute he was placed on his trial on charges framed in the alternative under sections 380 and 411 of the Indian Penal Code. He was acquitted and the Court directed that the jute which was the subject matter of the charge should be returned to him. While he was removing this jute he was again arrested, the jute was again seized and a proceeding was taken under section 54A of the Calcutta Police Act:

Held, that the petitioner could not be tried a second time on the same facts for an offence cognate to or involved in the offences with which he was previously charged. The proceedings came within the prohibition contained in section 403 of the Code of Criminal Procedure: *Queen-Empress v. Croft* (1) distinguished.

Revision under section 435 of the Criminal Procedure Code.

The facts appear from the judgment.

Babu Probodh Chandra Chatterjee for the Petitioner.

Mr. Orr for the Crown.

The judgment of the Court was as follows:

November, 28.

This Rule was issued on the Chief Presidency Magistrate to show cause why certain proceedings taken against the petitioner under section 54A of the Calcutta Police Act should not be quashed. The petitioner is a dealer in jute carrying on business at 115 Benia-tola Street Calcutta. It appears that he was found in possession of certain bales and half bales of jute. With reference to that jute he was placed on his trial before a Presidency Magistrate on charges framed in the alternative under sections 380 and 411, Indian Penal Code. He was convicted by the learned Magistrate in the alternative on those charges. He then moved this Court which set aside the conviction and directed that the jute which was the subject matter of the charge should be returned to him. Apparently he was removing this jute in 5 carts from the Thana where it had been stored when he was again arrested the jute being again seized in

* Criminal Revision No. 1109 of 1917, against the order of the Fourth Presidency Magistrate of Calcutta, dated the 21st September, 1917.

(1) (1895) I. L. R. 23 Calc. 174.

order that the present proceedings might be taken against him under section 54A of Calcutta Police Act. That section runs as follows: "Whoever has in his possession, or conveys in any manner, or offers for sale or pawn any thing which there is reason to believe to have been stolen or fraudulently obtained he shall, if he fails to account for such possession or act to the satisfaction of the Magistrate, be liable to fine * * *." The point taken before us on the petitioner's behalf is that having been acquitted of the charges made against him at the previous trial, he cannot now be tried again for the offence created by section 54A which I have read. There is no doubt that the act or possession made punishable by section 54A is an offence within the definition in the Criminal Procedure Code by which "offence" includes any act made punishable by any law for the time being in force. Section 403, Criminal Procedure Code, enacts in its first paragraph that "a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237." The question here is whether the petitioner is now to be tried on the same facts for an offence with which he might have been charged at the previous trial under section 236 or of which he might have been convicted at that trial under section 237. Section 236 provides that "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." For the present purpose section 237 carries the matter no further and need not be more particularly referred to. It is not disputed that the present proceedings relate to the same act or series of acts which were the subject of the previous trial. Mr. Orr who has appeared for the Crown does not deny that all the evidence which was relevant at the previous trial would be relevant on the present charge. The trial in other words will take place on the same facts and it is not suggested that there are any additional facts to be placed before the Court. In that state of things we can see no reason why the accused should not have been charged at the previous trial under the provisions of section 236 with the offence for which he is now being

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prosecuted as I have stated, the present proceedings relate to the same act or series of acts to which the previous trial related, and it appears to us that before that trial it might have been said in the terms of section 236 that it was doubtful whether the facts which could be proved would constitute theft or receiving stolen property or an offence under section 54A of the Calcutta Police Act. If that be so, the case clearly falls within illustration (a) of section 236 and the illustration attached to section 237. Reference was made in the course of the argument to the case of *Queen Empress v. Croft* (1). In our opinion that case is clearly distinguishable. The offences there in question were separate and distinct offences which were separately triable and punishable. It seems to us that the petitioner in the present case is about to be tried a second time on the same facts for an offence cognate to or involved in the offences with which he was previously charged. It is not suggested that if the previous conviction and sentence had been upheld by this Court, the petitioner could now be punished a second time under section 54A. The proceedings therefore come within the prohibition contained in section 403, Criminal Procedure Code. In that view of the matter the Rule must be made absolute and the proceedings quashed; and we direct accordingly.

With regard to the jute, we direct that it be redelivered to the petitioner.

A. T. M.

Rule made absolute.

(1) (1895) I. L. R. 23 Cal. 174.

APPELLATE CRIMINAL.

*Before Sir Charles Chitty, Knight, Judge, and Mr.
 Justice Richardson.*

TAHER KHAN AND OTHERS

v.

KING EMPEROR.*

CRIMINAL.
 1917.
 August, 13, 14.

Abduction—Married woman—Indian Penal Code (Act XLV of 1860), Sec. 366—'Warry.'

*Criminal Appeal No. 421 of 1917, against the order of B. Ghatak Esq., Sessions Judge of Faridpur, dated the 29th June, 1917.

Section 366 of the Indian Penal Code applies to the case of an abduction of a married woman. The word 'marry' in that section has the same meaning as the same word in section 494 and means the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid.

Appeal under section 410 of the Code of Criminal Procedure.

The petitioners were convicted and sentenced each to rigorous imprisonment for 2 years.

The material facts appear from the judgment.

Babus Manmatha Nath Mukerjee, Amarendra Nath Bose and Pankaj Kumar Ganguli for the Petitioners.

Messrs. Orr and Camell for the Crown.

The judgment of the Court was delivered by

Richardson, J.—The four appellants were tried before the Sessions Judge of Faridpur sitting with two assessors on a charge framed under section 366, Indian Penal Code. The assessors were for acquitting the appellants. The learned Sessions Judge has convicted them and sentenced them each to rigorous imprisonment for two years.

The actual facts are simple enough. The abducted woman Wazidunnessa had been living with her husband at Dhubri. On her husband's death she returned as a widow to live with her mother Abdunnessa at Paikandi in the Faridpur district. While there she received a proposal of marriage from one Daliladdi. The proposal was distasteful to her—Daliladdi being an old man with wife and children, and she therefore refused. She and her mother, however, came to the conclusion that it was desirable that she should marry a man who would reside with them and also maintain the mother. She accordingly, on the 18th April last, entered into a marriage in *nika* form with one Piziraddin. On the following day the four appellants with Daliladdi came to her house and took her away by force to the house of the appellant Mobarak Ali. There is evidence that while she was at that house, she received another proposal of marriage from Daliladdi.

The abduction took place in broad daylight and does not seem to have been accompanied with much force or violence; but there is no reason to suppose that the woman Wazidunnessa went with the appellants willingly. Both the learned Sessions Judge and the assessors appear to have been agreed as to the facts proved in their main outline. The assessors, however, felt some difficulty in finding that the intention charged, namely, that the woman should be compelled to marry Daliladdi against her will had been sufficiently

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Richardson, J.

established by the evidence. We have been taken through the depositions of the witnesses; and, having considered those depositions, we are satisfied that the learned Sessions Judge was right in the conclusion that the accused abducted the woman with the criminal intent necessary to an offence under section 366, Indian Penal Code.

In this Court it is suggested that section 366 does not apply to the case of the abduction of a married woman. It is suggested that that might be an offence under some other section of the Code for instance section 498. We see no reason to doubt, however, that the word 'marry' in section 366 has the same meaning as the same word in section 494. What it means is—the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid. If the facts and the law applicable to them are as we have stated, the question in this case narrows down simply to the question of sentence.

The appellants as we have said have been sentenced each to two years rigorous imprisonment. In the circumstances, that sentence seems to us to be excessive. If we reduce it, however, it is in the hope that the appellants will not molest either Wazidunnessa or her mother or husband again. If they do so they may find themselves in a worse position than they are now. On the whole, we are of opinion that the ends of justice will be met by reducing the sentence passed on each of the accused to a sentence of rigorous imprisonment for six months; and we order accordingly.

A. T. M.

Appeal dismissed: Sentence reduced.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

SATYESH CHANDRA SARKAR AND OTHERS

v.

Haji JILLAR RAHMAN.*

CIVIL.

1917.

July, 30, 31.

Suit, if lies—Suit for recovery of arrears of rent—Rent, apportionment of—Joint landlords and tenants—Rights and obligations—Bengal Tenancy Act (VIII of 1885), Sec. 61.

* Appeal from Appellate Decree No. 3101 of 1915, against the decree of G. N. Roy Esq., District Judge of Burdwan, dated the 26th August, 1914, affirming that of Babu Jadab Chandra Bhattacharjee, Subordinate Judge of Burdwan, dated the 30th June, 1914.

The plaintiff and the fourth defendant were, at the date of the institution of a suit for apportionment of rent and for recovery of arrears at the rate settled by the decree, joint landlords of the tenants defendants. It was not possible for the tenants to obtain joint receipts of the co sharers for payment of rent. The tenants, consequently, made deposits in Court under section 61 of the Bengal Tenancy Act :

Held, that the plaintiff could not, as a matter of right, claim from the tenants, what he estimated to be his proportionate share of the rent, before the rent was actually apportioned by the decree made in the suit : *Iskwar v. Ram Krishna* (1) and *Rajnarain v. Bhadasi* (2) referred to.

That the deposit of rent by the tenants under section 61 of the Bengal Tenancy Act, was a valid one.

Appeal by the Tenants Defendants.

Suit for apportionment of rent and for recovery of arrears at the rate settled by the decree.

The material facts and arguments appear from the judgment.

Babus Dwarka Nath Chuckerbutty, Hemendra Nath Sen and Nakuleswar Mukherjee (for *Babu Kalidas Sarkar*) for the Appellants.

Babus Mahendra Nath Ray and Mahes Chandra Panerjee for the Respondent.

The judgment of the Court was delivered by

Mookerjee, J—This is an appeal by the tenant defendants in a suit for apportionment of rent and for recovery of arrears at the rate settled by the decree. The Courts below have decreed the suit. On the present appeal, the tenants do not attack the decree for apportionment of rent, but they contend that the claim for arrears should have been dismissed, inasmuch as at the date of the institution of the suit, there were no arrears due. This contention is based on the fact that between the 15th May, 1911, and the 19th August, 1912, the tenants had made sixteen deposits in Court under section 61 of the Bengal Tenancy Act. It is not disputed that if these deposits were validly made, no arrears were due at the date of the commencement of the suit. The question in controversy consequently reduces to this: Were the deposits made in accordance with section 61.

This plaintiff and the fourth defendants were, at the date of the institution of this suit, joint landlords of the tenant defendants, and this is the assumption on which the apportionment of rent is claimed. Consequently, the tenants were not bound to pay rent to their landlords, unless they could obtain a joint receipt for such payments as

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(1) (1880) I. L. R. 5 Calc. 902; 6 C. L. R. 421.

(2) (1899) I. L. R. 27 Calc. 479; 4 C. W. N. 494.

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they might make. But, upon the facts which have been brought to light in the course of this litigation, there can be no reasonable doubt that it was not possible for the tenants to obtain such joint receipts. The case is thus fully covered by section 61 (1) (c) of the Bengal Tenancy Act which provides that when the rent is payable to co sharers jointly and the tenant is unable to obtain the joint receipt of the co-sharers for the money, and no person has been empowered to receive the rent on their behalf, the tenant may present to the Court, having jurisdiction to entertain a suit for the rent of his tenure or holding, an application in writing for permission to deposit in the Court the full amount of the money then due. The District Judge would have taken this view, if he had not erroneously held that the landlords could, at their choice, collect the rent in separate shares and that if they gave due notice to the tenants, it became the duty of the defendants to comply with the demand. The District Judge has overlooked that his opinion of the relative rights and obligations of joint landlords and their tenants is contrary to the rule enunciated by a Full Bench of this Court in the case of *Ishwar Chunder Dutt v. Ram Krishna Dass* (1). Sir Richard Garth C. J. stated in that case that a sale of a share in a tenure, which has been let to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure or an apportionment of the rent; but that if the purchaser of the share desires to have such a severance or apportionment, he is entitled to enforce it by taking proper steps for that purpose. If he takes no such steps, then the tenant is justified in paying the entire rent, as before, to all the parties jointly entitled to it. But if the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and, then, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit, *Rajnaraïn v. Ekadasi* (2). In the case before us, the plaintiff instituted the present suit for apportionment of rent on the 13th November, 1912. Before the rent has been actually apportioned by the decree made herein, the plaintiff could not, as a matter of right, claim from the tenants what he estimated to be his proportionate share of the rent. The reverse of this position was, undoubtedly, the exact attitude taken by him prior to this litigation. In these circumstances, the

(1) (1880) I. L. R. 5 Calc. 902; 6 C. L. R. 421.

(2) (1899) I. L. R. 27 Calc. 479; 4 C. W. N. 494.

tenants were competent to avail themselves of the provisions of section 61 (1) (c) of the Bengal Tenancy Act. We hold accordingly that the deposits were validly made, and, that at the date of the institution of the suit, the amount claimed as arrears was not due.

The result is that this appeal is allowed and the decree of the Court below modified. The decree in so far as it allows the claim for arrears with costs and interest will be set aside; but in so far as it apportions the rent will stand confirmed. Under the circumstances, each party will pay his own costs in all the Courts.

A. T. M.

Appeal allowed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Beachcroft.*

DURGA CHARAN ACHARJEE.

v.

KHUNDKAR ENAMAL HUQ AND OTH RS.*

Partition, suit for—Plaintiff to prove what—Joint owner and joint possession.

In a suit for partition, the plaintiff should establish that he and the defendant are not only joint owners but are also entitled to joint possession, as the object of the suit is to transfer the joint possession into possession in severalty.

Atrabannessa v. Safatulla (1) referred to.

Appeal by Defendant No. 3.

Suit for partition

The material facts and arguments appear from the judgment.

Babu Nagendra Nath Ghose for the Appellant.

Moulvi A. K. Fazlul Huq and *Babu Atindra Nath Mukherjee* for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the third defendant in a suit for partition of joint property. The lands are comprised in three plots and are included in an *ayma* estate within the Hooghly Collectorate. The case for the plaintiffs is that they have acquired a nine-tenths share of the lands and the third defendant has acquired the remaining share. The plaintiffs accordingly seek to have these

* Appeal from Appellate Decree No. 342 of 1915, against the decree of Babu Baroda Prosad Roy, Subordinate Judge of Hooghly, dated the 26th October, 1914, affirming that of Babu Naranath Mookerjee, Munsiff of Serampur, dated the 26th July, 1913.

(1) (1915) 22 C. L. J. 259; I. L. R. 43 Calc 504.

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lands partitioned. One of the defences is that this is really a suit for a partial partition and is consequently not maintainable. The Court of first instance overruled this contention on a ground which cannot be sustained and which need not be examined for our present purpose. Upon appeal, the Subordinate Judge has confirmed the decree of the trial Court but the reasons assigned by him in support of his conclusion are not intelligible. He sets out the first question for determination in these terms; namely, whether the suit is one for partial-partition and whether it is maintainable. But his discussion of the point is difficult to follow. The third defendant has purchased the lands in suit from the fourth defendant and the recital in the conveyance shows that according to the vendors of the appellant he had a certain share in the entire estate and that the lands conveyed were in his occupation as representing that share. This is not admitted by the plaintiffs. If the allegation is true, it may furnish a complete answer to the claim for partition: *Mahomed v. Mahomed* (1); *Burugapallii v. Nandigam* (2); *Sris v. Mahima* (3). If the fourth defendant, who was interested in all the lands of the estate, was by mutual arrangement with his co-sharers, placed in exclusive occupation of the lands now in controversy, as representing his share, that arrangement cannot equitably be disturbed by the plaintiffs, unless they seek a partition of all the lands comprised in the estate. In the present suit, however, they have limited their claim to the disputed lands which form only a small part of the entire land of the estate. Consequently the plaintiffs must establish that, in respect of the lands in suit, they and the third defendant are joint owners and entitled to joint possession. In order to determine whether they are entitled to joint possession, it must be found whether the vendor of the third defendant was entitled to exclusive possession or to joint possession. This point has not been investigated by either of the Courts below, and till the point has been determined, the validity of the claim for partition cannot be decided. It is essential in a suit for partition that the plaintiffs should establish that they and the defendants are not only joint owners but are also entitled to joint possession, because the object of the suit is to transform the joint possession into possession in severalty. *Atrabannessa v. Safatulla* (4).

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for reconsideration. Costs will abide the result.

A. T. M.

Appeal allowed: Case remanded.

(1) (1911) 15 C. W. N. 677.

(2) (1911) 10 M. L. T. 313.

(3) (1915) 23 C. L. J. 231.

(4) (1915) 22 C. L. J. 259; I. L. R. 43 Cal. 504.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

DIGAMBAR NANDA AND OTHERS.*

CIVIL.

1917.

August, 16, 17, 27.

Court fee—Memorandum of cross-objection—Court-fees Act (VIII of 1870 as amended in 1908)—Sch. I, Art. 1—Lease—Covenant for renewal.

Court-fees should be paid on a memorandum of cross-objections precisely in the same manner as on a plaint in a suit or on a memorandum of appeal. It is incumbent upon the respondent to value the relief claimed by way of cross-objection and to pay court-fees accordingly, though the appellant may have paid more than adequate court-fees on the memorandum of appeal.

Where there is a covenant for renewal, if the option does not state the terms of renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for renewal itself: *Secretary of State v. Forbes* (1) and *Lani Mia v. Muhammad* (2) referred to.

Appeal by the Defendant.

Suit to obtain a lease from Government in respect of an area of 18,510 bighas of land.

The material facts and arguments are stated in the judgment.

Babu Ram Charan Mitra for the Appellant.

Babus Sib Chunder Palit and *Kshirod Narayan Bhulya* for the Respondents.

C. A. v.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the Secretary of State for India in Council from the decree in a suit instituted by the respondents to obtain a lease from Government in respect of an area of 18,510 bighas of land. The facts material for the determination of the questions raised before us are not in controversy. On the 13th May, 1872, a settlement was made with Bholanath Nanda (predecessor of the plaintiffs) which was to continue from 1278 till the next measurement and settlement of rent. The settlement proceedings were completed about the year 1878, and on the 5th August, 1878, a patta was granted to Bholanath Nanda for a term of (22)

August, 27.

* Appeal from Original Decree No. 56 of 1915, against the decree of Babu Achinta Nath Mitra, Subordinate Judge of Midnapore, dated the 13th November, 1914.

(1) (1912) 16 C. L. J. 217.

(2) (1915) 20 C. W. N. 948.

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twenty-two years from 1285 to 1306 at a progressive rate of rent. This lease contained a covenant in the following terms :

"If you agree to pay the enhanced rent which will be fixed at the time of re-settlement in future, the Government will have the right to settle with you, and if you decline, with some other person."

The evidence shows that when the term of the lease came to an end in the year 1306 (1899-1900), settlement operations were still in progress, and, as a result, the lease was renewed for a term of one year only on the 28th May, 1900 ; this lease contained a covenant in the same terms as the lease of the 5th August, 1878. The tenancy was subsequently renewed from year to year, and the last of the series of annual leases was granted on the 6th January, 1908. By the time that the term of this lease expired, the settlement operations had been concluded, and, on the 19th March, 1909, the plaintiffs, (representatives of the original grantee), presented a petition to the Collector praying that the original lease might be renewed. On the 23rd March, 1909, this application was rejected by the Collector, and his order was confirmed by the Commissioner on appeal. On the 15th December, 1909, the Board of Revenue, however, reversed the order of the Commissioner, and directed that the petitioners should be offered a renewal of the lease, at enhanced rent, for one year only with effect from the 1st April, 1910, the new lease not to contain a clause for renewal. The plaintiffs refused to accept a renewal of the tenancy on these terms, and instituted the present suit on the 30th May, 1912. In the plaint, they prayed that the defendant might be directed to renew the lease of 1878 with a covenant for renewal or to execute a permanent lease. The Subordinate Judge has decreed the suit in part and has held that the plaintiffs are entitled to a lease for the period extending from the last settlement up to the completion of the next periodical settlement on the same terms as the lease of 1878 and at the rent assessed at the last settlement minus a profit of 20 per cent., but that there will be no clause about renewal in the new lease. The Secretary of State for India in Council has appealed against the decree on the ground that the plaintiffs cannot claim a renewal of the lease as a matter of right and that the suit should have been entirely dismissed. The plaintiffs have, on the other hand, presented a memorandum of cross-objections and have contended that they were entitled to a lease for twenty-two years with a covenant for renewal, if not, to a permanent lease. The memorandum of appeal by the Secretary of State was valued at Rs. 10280 (that is, at the same figure as the original suit) and Court-fees were paid *ad valorem*

thereon; this could be justified only on the hypothesis that the relief granted to the plaintiffs was all that they sought in their plaint. The memorandum of cross-objections also was valued by the plaintiffs respondents at Rs. 10280, (apparently on the assumption that the relief granted to them by the decree was entirely valueless) but no Court-fee was paid on the memorandum, on the ground that the Court-fee paid by the appellant fully covered the value of the suit. We ruled, at the hearing of this appeal, that the memorandum of cross-objections must be properly valued and Court-fees paid thereon *ad valorem*. Order 41, rule 22 (2) of the Civil Procedure Code, 1908, shows that a memorandum of cross-objections must conform to the requirements of order 41, rule 1, so far as they relate to the form and contents of a memorandum of appeal, and article 1 of schedule I to the Indian Court-fees Act, 1870 as amended in 1908, indicates that Court-fees must be paid on a memorandum of cross-objections precisely in the same manner as on a plaint in a suit or on a memorandum of appeal. It is thus impossible to sustain the view that a respondent who has presented a memorandum of cross-objections is excused from the payment of Court-fees thereon, merely because the appellant may have paid more than adequate Court-fees on the memorandum of appeal. In our opinion, it is incumbent upon the respondent to value the relief claimed by way of cross-objection and to pay Court-fees accordingly. This view is confirmed by the fact that under order 41, rule 22 (4), the cross-objection may be heard, even though the appeal is withdrawn or dismissed for default, which indicates, that, under the present Code, the memorandum of cross-objections stands, for some purposes at least, in the same position as the memorandum of appeal. In conformity with this expression of our opinion, the respondents have valued their cross-objections at Rs. 5,000 and have paid the deficit Court-fees due. The appeal and cross-objections must consequently now be considered on the merits.

There can be no room for reasonable doubt that the clause in the lease set out above embodied in essence a covenant for renewal. In the absence of such a clause, the grantor would have been at liberty, on the expiry of the term of the lease, to settle the land on any terms with any person he might choose; hence, if the construction were accepted that the clause was intended merely to reserve liberty to the Government to make a re-settlement with the lessee at enhanced rent, it would be obviously superfluous. It is not necessary for our present purpose to determine, whether, notwithstanding this clause in the lease, the Government might not, on the expiry of the term,

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decide not to settle the lands with anybody. This much is plain that if the Government did decide to re-settle the lands, the first offer would have to be made to the settlement-holder whose term had expired and a settlement would have to be made with him if he should agree to pay the enhanced rent ; in other words, he had the option of refusal. In the case before us, the Revenue authorities did actually decide that the land should be re-settled, and, in this contingency, the plaintiff was entitled to have the land settled with him at the enhanced rent. The decisions of this Court in the cases of *Secretary of State v. Forbes* (1) and *Lani Mia v. Muhammad Easin Mia* (2) show that where there is a covenant for renewal, if the option does not state the terms of renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for renewal itself. This view is in conformity with what is recognised as well-settled doctrine in England. Consequently in the case before us, immediately on the expiry of the lease of the 5th August 1878, the lessee became entitled to a fresh lease on the same terms as before, except as to the amount of rent and the covenant for renewal. No fresh grant, however, was made as we have seen, and the tenancy was renewed from year to year during a period of nine years. If nothing were known as to the reasons which moved the parties to adopt such a course, the inference might, perhaps, have been legitimately drawn that the lessee abandoned the right of renewal which he possessed under the lease of the 5th August 1878. It is indisputable, however, that the tenancy was renewed from year to year, because the settlement operations had not been completed and the amount of rent payable under the new arrangement had not yet been ascertained. The parties plainly intended that the grant of the new lease should be postponed till the fresh settlement, then in progress, had been completed. This is clear from the decision of the Board of Revenue given on the 15th December 1909 ; but the lease which was then offered to the plaintiffs was a lease for a term of one year only. In our opinion, the plaintiffs were not bound to accept the offer thus made. They were entitled to a renewal for the same period and on the same conditions as were to be found in the lease of the 5th August 1878, subject to the reservation that they were liable to pay the enhanced rent and could not claim the insertion of a covenant for renewal in the new lease. This in substance is all that they are entitled to have in the present suit, and the Subordinate Judge has made a decree

(1) (1912) 16 C. L. J. 217.

(2) (1915) 20 C. W. N. 948.

accordingly. But the plaintiffs and the defendant have both attacked this decree. The plaintiffs contend that they are entitled to a lease for 22 years with a covenant for renewal, that is, in substance, a lease in perpetuity though not at fixed rent. The defendant, on the other hand, contends that the suit should be dismissed as the plaintiffs are not entitled, as a matter of right, to fresh lease at all. For the reasons already assigned, neither of these extreme views can be sustained on principle. On a true construction of the lease of the 5th August 1878, we hold that it was a grant to continue till the next survey and settlement proceedings which happened to follow the previous one at an interval of 22 years. In this view the plaintiffs are entitled now to a lease to continue till the completion of the next periodical settlement, as the trial Court has decreed.

The result is that the appeal as well as the cross-objections must stand dismissed, and there will be no order for costs in this Court.

A. T. M.

Appeal and cross-objections dismissed.

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Beachcroft.*

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

SIBAPROSAD JANA.*

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1917.

August, 17, 27.

*Lease—Construction—Covenant for renewal—Erroneous admission by counsel,
effect of.*

A settlement was made with the predecessor of the plaintiff for a term of 22 years on a progressive rate of rent from 1285 to 1306. The *habuliat* executed by the grantee contained a covenant to the following effect: "If I agree to the enhancement of rent to be fixed at the time of the next settlement in future, the Government shall have the power to settle the lands with me, or if I do not agree, then with others":

Held, that the clause in the lease was in essence a covenant for renewal. That the lessee was entitled at the expiration of the term to obtain a renewal of the lease on the same terms as were contained in the original lease, except as

* Appeal from Original Decree No. 461 of 1915, against the decree of Babu Gopal Chandra Ganguly, Subordinate Judge of Midnapur, dated the 13th July, 1915.

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to the amount of rent and the covenant for renewal: *Secretary of State v. Forbes* (1); and *Lani Mia v. Muhammad* (2) referred to.

An erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the appellate Court: *Tagore v. Tagore* (3), and *Beni Pershad v. Dudhnath* (4) referred to.

Appeal by the Defendant.

Suit to obtain a lease from the Defendant.

The material facts and arguments appear from the judgment.

Babu Ram Charan Mitra for the Appellant.

Babus Biraj Mohan Mojumdar and *Kshirod Narayan Bhuiya* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

August, 27.

Mookerjee, J.—This is an appeal by the Secretary of State for India in Council from the decree in a suit instituted by the respondent to obtain a lease from Government in respect of the lands described in the schedule to the plaint. The facts material for the investigation of the rights of the parties are not in dispute at this stage. On the 5th August, 1878, a settlement was made with one Radhika Prasanna Chandra (the predecessor of the plaintiff) for a term of 22 years on a progressive rate of rent from 1285 to 1306. The *kabuliat* executed by the grantee contained a covenant to the following effect:

"If I agree to the enhanced rent to be fixed at the time of the next settlement in future, the Government shall have the power to settle the lands with me, or if I do not agree, then with others." When the term of the lease expired in the year 1900, the settlement operations were still in progress, and annual leases, renewed from year to year, were granted to the successor in interest of the original lessee. The last of these annual leases was executed on the 18th January 1909, and was to remain in force from the 1st April, 1909 to the 31st March, 1910. The settlement operations were concluded during the course of the year just mentioned, though the record-of-rights was not finally published till the 30th June, 1910. The plaintiff thereupon unsuccessfully endeavoured to obtain a re-settlement on the same terms as were embodied in the initial lease of the 5th August, 1878 except as to the amount of rent payable; the result was that the plaintiff instituted this suit on the 1st March,

(1) (1912) 16 C. L. J. 217.

(2) (1915) 20 C. W. N. 948.

(3) (1872) 9 B. L. R. 377 (401); I. A. Sup. Vol. 47; 18 W. R. 359.

(4) (1899) I. L. R. 27 Calc. 156 (163); L. R. 26 I. A. 216.

1913. In the Court below, it was not seriously denied that the plaintiff was entitled to a re-settlement; the controversy really centred round the terms on which the re-settlement should be made, specially whether there should or should not be a covenant for renewal in the new lease. The Subordinate Judge has held that the plaintiff is entitled to obtain a lease for a period of 22 years from the date of execution of the document, containing all the terms of the lease of the 5th August 1878, with the exception of the covenant for renewal. The defendant has appealed to this Court.

In support of the appeal, the Government pleader has urged that the plaintiff is not entitled as a matter of right to a re-settlement. Notwithstanding the fact that the right of the plaintiff to obtain a fresh lease was conceded in the Court below, it is unquestionably competent to the Government pleader to take up this line of argument, because as ruled by the Judicial Committee in *Tagore v. Tagore* (1), and *Beni Pershad v. Dudhnath* (2), an erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the appellate Court. *Holms v. Johnston* (3); *Mitchell v. Cotten* (4); *Urquhart v. Butterfield* (5); *Abdullah v. Asraf Ali* (6); *Ramsaran v. Khakhan* (7). We must consequently consider, whether the plaintiff is entitled to obtain a lease from the government in respect of the disputed lands. We are of opinion that this question should be answered in the affirmative. In the first place, it is plain that the clause in the lease set out above is in essence a covenant for renewal. It would be meaningless to hold that it was intended merely to confer an authority upon the government to grant a fresh lease. In the absence of such a clause, the grantor would have been at liberty, on the expiry of the lease, to make a fresh settlement at his choice subject to the provisions of Regulation VII of 1822. The obvious intention was that if the grantee was willing to take a fresh lease at the enhanced rent, he should be entitled to do so. This view is in accord with that adopted in the case of *Secretary of State v. Forbes* (8), and *Lani Mia v. Muhammad Easin Mea* (9). Consequently, when the term of the first lease expired in 1900, the lessee was in a position to enforce the covenant for renewal. The fact that

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(1) (1872) 9 B. L. R. 377 (401); I. A. Sup. 47; 18 W. R. 359.

(2) (1899) I. L. R. 27 Calc. 156 (163); L. R. 26 I. A. 216.

(3) (1873) 12 Heisk (59 Tenn). 155. (4) (1850) 3 Fla. 134.

(5) (1887) 37 Ch. D. 357.

(6) (1907) 7 C. L. J. 152 (163).

(7) (1906) 11 C. W. N. 340.

(8) (1912) 16 C. L. J. 217.

(9) (1915) 20 C. W. N. 948.

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the lease was not renewed at that time may, in the absence of an explanation, raise a presumption that the lessee abandoned his right in this respect. But the undisputed circumstances of the case leave no room for doubt that the lease was not renewed at that time because the settlement operations had not been concluded and the amount of the enhanced rent could not accordingly be determined. The lease was thus renewed from year to year at the original rate of rent, and this continued up to the time of the completion of the settlement proceedings. We can see no escape from the position that at that stage the lessee became entitled to obtain a renewal of the lease on the same terms as were contained in the original lease, except as to the amount of rent and the covenant for renewal, as explained in the case of *Secretary of State v. Forbes* (1). His right in this respect was in force at the date of the institution of the suit and the decree must be made accordingly. The Subordinate Judge, however, has made a decree for a lease for 22 years from the date of the execution of the lease. On a true interpretation of the original lease we are of opinion that that lease was essentially for the term of the rent then fixed in the settlement proceedings. The intention plainly was that the lease should continue so long as the rent was not altered by a survey and settlement proceeding, and this happened to be a period of 22 years. Much confusion will obviously result if a lease is now granted for 22 years at the rent fixed at the last settlement and a new rent roll is prepared during the currency of the lease. The decree of the Subordinate Judge must accordingly be modified by the substitution of the words "for the period extending from the 1st April, 1910, till the completion of the next periodical settlement and at the rent assessed at the last settlement minus a profit of 20 per cent. and" in place of the words "for a period of 22 years from the date of the execution of the patta by the defendant in favour of the plaintiff," and further by omitting the words "for a term of 22 years." As the appeal has succeeded only in part, there will be no order for costs in this Court. A self-contained decree will be drawn up in this Court.

A. T. M.

Decree modified.

(1) (1912) 16 C. L. J. 217.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

ATUL CHANDRA SINHA

v.

KUNJA BEHARY SINHA. *

CIVIL.

1917.

August, 22.

*Restitution—Preliminary decree for partition, set aside—Final decree, effect of—
Sum levied in execution of final decree.*

When a preliminary decree for partition has been set aside on appeal, no effect remains in the final decree which is passed pending appeal from the preliminary decree : *Jalil v. Amar* (1) followed. If any sum is levied on the basis of the final decree in execution by A against B, the latter is entitled to restitution of the sum so levied, if his claim is not barred by limitation.

The doctrine of restitution applies, not only where a decree has been set aside directly on review or by way of appeal, but also where a decree ceases to be operative by reason of cancellation of another decree or decree which forms its foundation : *Ashtosh v. Upendra* (2) followed.

Appeal by the Plaintiff.

Suit for partition of joint property.

The material facts appear from the judgment.

Babu Satkariipati Roy for the Appellant.

Babu Jyoti Prasad Sarbadhikary for the Respondent.

The Judgment of the Court was delivered by

Mookerjee, J.—This is an appeal against an order for restitution made by the lower appellate Court in confirmation of that of the trial Court. The appellant was the plaintiff in a suit for partition of joint property brought against the respondent and another person. A preliminary decree was made on the 9th September, 1910. The defendant other than the respondent preferred an appeal against that decision. That appeal was ultimately allowed and the preliminary decree was set aside in its entirety on the 29th November, 1911. The appellant thereupon preferred a second appeal to this Court. That appeal was dismissed on the 19th April, 1915. Meanwhile, on the 1st September, 1911, the final decree had been made by the Court of first instance on the basis of the preliminary decree of the 9th September, 1910. The appellant was entitled to

August, 22.

* Appeal from Appellate Order No. 57 of 1917, against the decision of W. N. Delevinge Esq., District Judge of Midnapore, dated the 24th August, 1916, affirming that of Babu Prafulla Chandra Dutt, Munsiff of Ghatal, dated the 17th June, 1916.

(1) (1913) 18 C. L. J. 223.

(2) (1916) 24 C. L. J. 467.

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receive certain sums from the respondent under the final decree so made, and, on the 29th April, 1911, he realised these sums. On the 10th April, 1916, the respondent applied for restitution of those sums of money. The Court of first instance allowed the application on the 17th June, 1916, and that order was confirmed by the lower appellate Court on the 24th August, 1916. The question in controversy is, whether the order for restitution has been properly made.

It is clear that the effect of the cancellation of the preliminary decree was to render inoperative the final decree. This view is supported by the decision in *Abdul Jalil v. Amar Chand Paul* (1), where it was ruled that when a preliminary decree for partition has been set aside on appeal, no effect remains in the final decree, which may have been passed pending the appeal from the preliminary decree. We must take it, then, that the final decree is no longer operative. Consequently the respondent is entitled to restitution of the sums levied from him by the appellant on the basis of that decree. This is clear from the decision in *Ashutosh Goswami v. Upendra Prosad Mitra* (2). It was there pointed out that the doctrine of restitution applies, not only when the decree has been set aside directly on review or by way of appeal, but also where the decree ceases to be operative by reason of cancellation of another decree or order which forms its foundation. The respondent is thus entitled to restitution from the appellant, if his claim is not barred by limitation.

The appellant contends that the rule applicable to cases of this character is contained in article 181 of the second schedule to the Indian Limitation Act, and, that the application should have been made within three years from the date when the preliminary decree was reversed by the lower appellate Court, that is, from the 29th November, 1911. As explained in *Ashutosh Goswami v. Upendra Prosad Mitra* (2), it is not necessary for us to decide whether any rule of limitation is applicable to cases of this character, because even if article 181 applies, time ran against the respondent from the date when the final pronouncement was made in the proceedings instituted to test the propriety of the preliminary decree. An application for restitution immediately on reversal of the preliminary decree by the first appellate Court would have been futile, the appellant who had preferred a second appeal, cannot very well maintain the position that the respondent should have pressed for

(1) (1913) 18 C. L. J. 223.

(2) (1916) 24 C. L. J. 467.

restitution at a time when the appellant was seriously controverting the decision of the lower appellate Court as to the correctness of the preliminary decree. If an application had been made at that stage, it would have been undoubtedly contended that no restitution should be allowed till the question of the correctness of the preliminary decree had been finally decided by the ultimate Court of appeal where the appellant had lodged an appeal.

We are accordingly of opinion that the order of the District Judge must be affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold mohur.

A. T. M.

Appeal dismissed.

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Before Mr. Justice Richardson and Mr. Justice Beachcroft.

SAKHIUDDIN SAHA AND OTHERS

v.

SONAULLA SARKAR AND OTHERS.*

CIVIL.

1918.

*January, 22, 23.**February, 8.*

Mortgage—Subsequent transfer of mortgaged property—Misrepresentation by some of the mortgagees, effect of—Estoppel—Transfer of Property Act (IV of 1882), Secs. 3, 8, 54, 78, 130—Co-mortgagee's interest, if severable or partible—Mortgage bond, transfer of, if to be made by a registered instrument—Indian Registration Act, 1908, Sec. 17(b)—'Immovable property.'

Where some of the mortgagees led a subsequent purchaser of a portion of the mortgaged property and a puisne mortgagee of the remainder to believe that the whole property was unencumbered ;

Held, that they were precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against the subsequent transferees, and the effect of the estoppel was to postpone them in respect of their share of the original debt to the puisne mortgagee.

Held also, it was open to the Court to sever their interests from those of the mortgagees who were under no disability or disqualification, and to make a decree in favor of the latter in proportion to their interest in the debt.

Davenport v. James (1) referred to.

*Appeal from Appellate Decree No. 230 of 1915, against the decree of Babu Baldyanath Ghatak, Additional Subordinate Judge at Rungpur, dated the 7th November, 1914, affirming that of Babu Bepin Chandra Chatterjee, Munsiff, 2nd Court, at Rungpur, dated the 16th August, 1913.

(1) (1847) 7 Hare 249.

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Sonanlla,

Per Richardson J.—A mortgage debt is immovable property both for the purposes of section 54 of the Transfer of Property Act, and for the purposes of section 17(b) of the Indian Registration Act.

Ganpat Pundurang v. Adarji Databhai (1) and *Joharmul v. Tejram Jagrup* (2) followed.

Malcolm v. Charlesworth (3) and *Grisham Life Assurance Society v. Crowther* (4) distinguished.

Appeal by the Plaintiffs.

Suit for the enforcement of a mortgage bond.

The material facts will appear sufficiently from the judgment of Richardson J.

Babu Atul Chandra Gupta for the Appellants.

Babu Satya Charan Sinha for *Babu Jitendra Nath Roy* for the Respondents.

C. A. V.

The following judgments were delivered :

February, 8.

Richardson, J.—This is a suit brought by the plaintiffs as mortgagees to enforce their security. Plaintiff No. 12 is one of the two original mortgagees and plaintiffs Nos. 1-11 are the heirs and successors of the other. The defendants Nos. 1-3 are the mortgagors. Subsequent to the mortgage, defendants Nos. 4, 5 and 6 purchased a portion of the mortgaged property and defendant No. 7 took a puisne mortgage of the remainder. In connection with those transactions, however, it has been found and cannot now be disputed, that the plaintiffs Nos. 1, 2 and 12 led the defendants Nos. 4-7 to believe that the whole property was unencumbered. The position, therefore, is that the plaintiffs Nos. 1, 2 and 12 are precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against those defendants.

In that state of things the Courts below have concurred, in dismissing the suit so far as the plaintiffs Nos. 1, 2 and 12 are concerned and in making in favour of the remaining plaintiffs a mortgage decree in the usual form entitling them to sell the whole of the mortgaged property in satisfaction of their share of the original mortgage-debt.

The plaintiffs have appealed to this Court and the first point which arises is free from difficulty.

As regards the defendants Nos. 4 to 6, who took an apparently absolute title to the portion of the property which they purchased,

(1) (1877) I. L. R. 3 Bom. 312.

(2) (1892) I. L. R. 17 Bom. 235.

(3) (1836) 1 Keen 63.

(4) (1915) 1 Ch. 214.

the claim of the plaintiffs Nos. 1, 2 and 12 has been rightly dismissed. But as regards the defendant No. 7 the effect of the estoppel, under section 78 of the Transfer of Property Act, is to postpone them (in respect of their share of the original debt) to that defendant. As between the plaintiffs Nos. 1, 2 and 12 and the defendant No. 7 therefore, the suit should not be dismissed and the decree should declare that the property mortgaged to the defendant No. 7 is hypothecated to the plaintiffs Nos. 1, 2 and 12 for their share of the original mortgage-debt and that their rights as mortgagees are postponed to those of the defendant No. 7. The decrees of the Courts below will be modified accordingly.

The further contention on behalf of the plaintiffs who may be described as innocent plaintiffs, that they are in a position to demand that a decree should be made in favour of the mortgagees as a body for the whole of the mortgage-debt, is untenable. Nor are we obliged to tell the defendants Nos. 4-7 that their only remedy lies in an action for deceit. In equity co-mortgagees are presumably tenants-in-common of the mortgage debt and their interests are severable or partible among themselves. One of them can sue on the mortgage provided those who are unwilling to be joined as plaintiffs are made defendants. *Davenport v. James* (1). There is nothing to take the present case out of the general rule. The innocent plaintiffs are not damnified by the way in which the case has been dealt with. Some of the mortgagees have by their conduct precluded themselves from enforcing their rights under the mortgage and it was open to the Court to sever their interests from those of the mortgagees who were under no disability or disqualification and to make a decree in favour of the latter in proportion to their interest in the debt.

The contention last dealt with has been advanced solely for the purpose of evading the ruling of the Courts below on another question which has given rise to some discussion before us. The two original mortgagees were brothers and they each had an eight annas share in the mortgage. It is said that there was a partition of the joint property by which the bond in suit was allotted to the deceased brother, the predecessor of the plaintiffs Nos. 1-11. On that footing the plaintiff No. 12 was in the first instance made a defendant. He was made a plaintiff by direction of the learned Munsiff when he found that the partition had not been proved, a finding which has been affirmed by the learned Subordinate Judge. The objection taken is that in dealing with this part of the case the Courts below

(1) (1847) 7 Hare 249.

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have wrongly refused to receive in evidence two documents by which the partition of the bonds in which the brothers had a joint interest was effected. These documents are not registered and have been rejected on that ground on the authority of *Upendra Nath Banerjee v. Umes Chunder Banerjee* (1) where it was held that a deed of partition, either declaring certain rights over immovable property or reciting the allotment of lands and containing an agreement to act accordingly, is compulsorily registrable. In my opinion the rejection of these documents has, as the language of the two judgments shows, largely influenced the conclusion at which the Courts below have arrived on the question of partition or no partition. If the Subordinate Judge intended to say that even if these documents be taken into account, the partition is not proved, he has not expressed himself very happily. The point raised, therefore, seems to me to require consideration.

It is contended for the plaintiffs that the case cited below has no application because the transfer of a simple mortgage such as the bond in suit or a share in such a mortgage is not a transfer of immovable property within the meaning of section 54 of the Transfer of Property Act, and the document by which the transfer is effected is not a document which purports or operates "to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent...to or in immovable property" within the meaning of section 17(b) of the Indian Registration Act.

In support of this contention it is said that the transfer of a simple mortgage is merely the transfer of a debt on which the security is attendant, the security passing to the transferee with the debt under section 8 of the Transfer of Property Act.

For authority, reference is made to *Gows Mahomed v. Khawas Ali Khan* (2) *Baij Nath Lohsa v. Binoyendra Nath Palit* (3) and *Ram Ratan Chuckerbutty v. Jogesh Chandra Bhattacharya* (4). These cases are perhaps not entirely consistent with the earlier decision of this Court in *Koob Lall Chowdhry v. Nityanund Singh* (5) or with the decision of the Allahabad High Court in *Abdul Majid v. Muhammad Faizulla* (6). However that may be they relate to the transfer of mortgage decrees and the considerations which apply to such transfers may not be altogether applicable to the transfer of mortgage bonds. Order XXI rule 16 of the Civil

(1) (1910) 12 C. L. J. 25.

(2) (1896) I. L. R. 23 Calc. 450.

(3) (1901) 6 C. W. N. 5.

(4) (1907) 12 C. W. N. 625.

(5) (1883) I. L. R. 9 Calc. 839

(6) (1890) I. L. R. 13 All. 89.

Procedure Code appears to contemplate the transfer of a decree "by assignment in writing" though the Code does not say whether the writing must be registered when the decree transferred is a mortgage decree.

If therefore we confine ourselves to transfers of mortgage-bonds or mortgages, it has first to be noticed that "a debt secured by mortgage of immovable property" is expressly excluded from the definition of "actionable claim" added to section 3 of the Transfer of Property Act by the amending Act of 1900 (Act No. II of 1900). And inasmuch as section 8 of the Act speaks of "a debt or other actionable claim" (in the clause which deals with the passing of the securities therefor), section 8 can be of no assistance to the appellants for the present purpose, though in other connections the principle underlying the section will no doubt be applicable (Ghose's Law of Mortgage in India, 7th edition, Vol. I pp. 70, 71 and Vol. II p. 667).

The transfer of actionable claims is governed by section 130 of the Act which requires the execution of an instrument in writing signed by the transferor or his duly authorized agent, and it can hardly be supposed that debts secured by mortgages of immovable property were excluded from the definition of actionable claims in order that they might pass by word of mouth without any writing. The inference would seem to be that the legislature regarded such debts as immovable property within the definition in section 3 (25) of the General Clauses Act of 1897. "Immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." For the purposes of the Transfer of Property Act that definition is only qualified by the clause in section 3 of that Act which says that "immovable property" does not include standing timber, growing crops or grass."

And if a mortgage debt is within the definition of immovable property in the General Clauses Act, it is also within the definition of such property in section 2 (6) of the Registration Act of 1908.

It would follow that a mortgage debt is immoveable property both for the purposes of section 54 of the Transfer of Property Act and for the purposes of section 17 (b) of the Registration Act.

If that be the true view it would be sufficient in the case before us to say that where a mortgage debt is transferred by an instrument in writing and the value of the right, title or interest transferred is one hundred rupees or more, the writing requires registration under the Registration Act.

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In the work already referred to the learned author remarks, quite generally and without reference to any statutory definition, that "whatever may be the form of the mortgage, it operates as a transfer of an interest in the land which is given as security." (The Law of Mortgages in India 4th Edition Vol. I p. 72). If a mortgage even a simple mortgage creates an interest in land, its transfer must be the transfer of an interest in land. In the second volume of the same work at page 729, it is said that "a mortgage on land is immovable property and reference is made to *In re Hoyles* (1).

The learned pleader for the plaintiff cited the cases of *Malcolm v. Charlesworth* (2) and *Gresham Life Assurance Society v. Crowther* (3). But those cases turn on the provisions of an English Statute which permit the registration of assurances by which lands are "affected," and have no application to the different language of the Indian Registration Act.

The conclusion at which I arrive is that the cases on which the learned pleader relies are at any rate distinguishable and that the Courts below have taken a correct view of the requirements of the Registration Act. We are not referred to any decision of this Court precisely in point but the conclusion is supported by the ruling of the Bombay High Court in *Ganpat Pandurang v. Adarji Dadabhai* (4) and see also *Johanna v. Tejram Jagrup* (5).

The result is that in my opinion subject to the modification above directed the decrees of the Courts below should be affirmed and the appeal dismissed. The appellants having substantially failed, the respondents are entitled to their costs of the appeal.

Beachcroft, J.—I agree that the appeal should be dismissed subject to the modification in the decree proposed by my learned brother for the reason given by him.

But I express no opinion on the question whether the learned Subordinate Judge was right in his view on the question of registration for, as I understand his judgment, he finds as a fact that no partition was made between Bhetu and Netu, whether the evidence which he holds to be inadmissible, be excluded from or taken into consideration.

A. N. R. C.

Decree varied.

(1) (1911) 1 Ch. 179.

(2) (1836) 1 Keen 63.

(3) (1915) 1 Ch. 214 (225).

(4) (1877) 1 L. R. 3 Bom. 312.

(5) (1892) 1 L. R. 17 Bom. 235 (252).

Before Mr. Justice Teunon and Mr. Justice Newbould.

ANANDIRAM MANDAL

v.

GOZA KACHORI AND OTHERS.*

CIVIL

1918.

January, 25.
February, 7.

Agreement, opposed to public policy—Void agreement—Consideration, refund of—Agreement to serve till payment of the principal sum—Bond, if enforceable.

A suit is maintainable for the recovery of the sum actually paid pursuant to an agreement which was opposed to public policy.

Bakshi Das v. Naidu Das (1) followed.

Mohori Bibee v. Dharmadas Ghose (2) referred to.

Quære: whether an agreement by which the defendants, in consideration of a sum advanced by the plaintiff, agreed that one of them should always work for the plaintiff till the payment of the principal sum, and interest on that sum was not to be paid in cash but was to be liquidated by the services of one or other of them, whom the plaintiff undertook to feed but not to clothe, was a slavery bond and not enforceable as being opposed to public policy.

Application by the Plaintiff.

Suit for recovery of a principal sum with interest on the basis of a contract. The terms of the contract will appear sufficiently from the judgment. Both the lower Courts being of opinion that the agreement was opposed to public policy, dismissed the plaintiff's suit. Plaintiff then moved the High Court and obtained the Rule.

Bnbu Probodh Chandra Ray for the Petitioner.

No one for the Opposite Party.

C. A. V.

The judgment of the Court was as follows :

This is a Rule calling on the opposite party to show cause why the judgment and decree complained of should not be set aside and such other order made as to this Court may seem fit and proper.

January, 25.

The plaintiff who is the petitioner before us brought this suit to recover a sum of Rs. 147 with interest and costs. The plaintiff's allegations were that he advanced a sum of Rs. 120 for marriage-expenses to the two defendants, who are brothers, on their executing a bond by which they agreed in consideration of the sum advanced that one of them should always work for the plaintiff. Interest

* Civil Rule No. 640 of 1917, against the decision of J. F. Graham Esq, District Judge, Assam Valley District, dated the 15th April, 1917, affirming that of D. N. Chowdhry, Esq., Munsiff of Gauhati.

(1) (1905) 1 C. L. J. 261.

(2) (1903) I. L. R. 30 Calc. 539.

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was agreed on at 8 annas per Rs. 20 *i.e.* 2½ per cent. per mensem and the sum of three rupees due on this account each month was not to be paid in cash but was to be liquidated by the services of one or other of the two brothers whom the plaintiff undertook to feed but not to clothe. Both the lower Courts have held that the bond was a slavery bond and not enforceable as being opposed to public policy. The suit has been dismissed on the pleadings without any evidence being taken.

We are doubtful whether the lower Courts were right in holding that the terms of this agreement between the parties were such that it cannot be enforced on the ground of being opposed to public policy. If one of the brothers alone had executed the contract the case of *Ram Sarup Bhagat v. Banvi Mandar* (1), cited by them would support their view. But in the present case while one brother was working for the plaintiff it would be possible for the other brother to earn money elsewhere and in course of time pay off the principal debt and release them both. But it is unnecessary to discuss this aspect of the case at greater length. In any case the contract for service is not one that can be specifically enforced and even if the agreement be opposed to public policy yet when the facts have been fully ascertained, it may be that on the equitable principles embodied in sections 38 and 41 of the Specific Relief Act, the plaintiff may be found entitled to restitution of the whole or some part of the money advanced. It was held by their Lordships of the Privy Council in *Mohori Bibee v. Dharmodas Ghose* (2), that these sections give a discretion to the Court when under the circumstances of the case justice requires the return of money paid in respect of a transaction held to be void. We may also refer to the case of *Bakshi Das v. Nadu Das* (3), where following the decisions of this Court in *Juggessur Chuckerbutty v. Panchcowree Chuckerbutty* (4), and *Ram Chand Sen v. Audaito Sen* (5), it was held that a suit was maintainable for the recovery of the sum actually paid pursuant to an agreement which was opposed to public policy.

We accordingly make this Rule absolute and direct that the case be sent back to the Munsiff of Gauhati to be tried according to law. As the opposite party did not appear we make no order as to costs.

A. N. R. C.

Rule made absolute.

(1) (1915) I. L. R. 42 Calc. 742.

(2) (1903) I. L. R. 30 Calc. 539 (549).

(3) (1905) I C. L. J. 261.

(4) (1870) 14 W. R. 154.

(5) (1884) I. L. R. 10 Calc. 1054.

Before Mr. Justice Teunon and Mr. Justice Newbould.

MADHUSUDAN GOPE

v.

BEHARI LAL GOPE AND OTHERS.*

CIVIL,

1918.

February, 8.

Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), Sec. 25—Courts vested with Small Cause Court jurisdiction—Suit, instituted in such a Court—Civil Procedure Code (Act V of 1908), Sec. 24 cl. (4)—Suit, transfer of—Court of Small Causes, meaning of—Provincial Small Cause Courts Act (IX of 1887), Secs. 5, 16.

A Court of Small Causes under section 24 (4) of the Code of Civil Procedure, from which a suit may be transferred or withdrawn, does include Courts, vested with Small Cause Court jurisdiction as well as the special Courts constituted under the Provincial Small Cause Courts Act.

Sankararama Iyer v. R. Padmanabha Iyer (1) and *Sukha v. Raghunath Das* (2) followed.

Dulal Chandra Deb v. Ram Narain Deb (3) dissented from.

Application by the Plaintiff under section 25 of the Provincial Small Cause Courts Act.

The material facts will appear sufficiently from the judgment.

Babu Bepin Behari Biswas for the Petitioner.

Babu Ramesh Chandra Sen for the Opposite Party.

The judgment of the Court was as follows:

In this case it appears that a suit of a Small Cause Court nature valued at Rs. 140 was instituted in the Court of the Subordinate Judge at Dacca vested with powers under section 25 of the Bengal, Agra and Assam Civil Courts Act for trial of suits cognizable by Courts of Small Causes up to a value not exceeding Rs. 500. For certain special reasons into which we need not enter the District Judge of Dacca by an order made under the provisions of section 24 of the Civil Procedure Code, transferred the suit for trial to the Court of a Munsiff at Dacca vested with Small Cause Courts powers, but exercising jurisdiction in such cases only up to a value not exceeding Rs. 100. The suit was tried by the Munsiff without objection taken by the plaintiff who is the petitioner before us and it resulted in a decree for a sum of about Rs. 75.

*Civil Rule No. 602 of 1917, against the decision of K. K. Dutt, Esq., Munsiff, 4th Court, Dacca, dated the 26th April, 1917.

(1) (1912) I. L. R. 38 Mad. 25.

(2) (1916) 15 All. L. J. 69.

(3) (1904) I. L. R. 31 Calc. 1057.

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The petitioner now comes to this Court and contends that by virtue of the provisions of section 16 of the Provincial Small Cause Courts Act and by reason of the pecuniary limitation on his Small Cause Court jurisdiction, the Munsiff was not competent, nor had he any jurisdiction to try the suit in question.

The answer to this contention put forward by the opposite party is that by virtue of the provisions of sub-section 4 of section 24 of the Code of Civil Procedure, the Court of the Munsiff must, under the circumstances, be deemed to be a Court of Small Causes within the meaning of section 16 of the Provincial Small Cause Courts Act. In support of this contention he refers us to the cases of *Sankararama Iyer v. R. Padmanabha Iyer* (1), and *Sukha v. Raghunath Das* (2). By the petitioner we have been referred to the case of *Dulal Chandra Deb v. Ram Narain Deb* (3), in which the learned Judges who heard and decided that case intimated that they were inclined to a contrary view. That expression of opinion was not, however, as indeed the learned Judges themselves have pointed out, necessary to the decision of the case before them and must therefore be regarded as an expression of opinion and no more. With all deference, we are unable to agree in that opinion and for the reasons given in the cases decided by the Madras and Allahabad High Courts to which we have referred, we are of opinion that a Court of Small Causes under section 24(4) of the Code of Civil Procedure does include Courts vested with Small Cause Court jurisdiction as well as the special Courts constituted under Act IX of 1887. It follows therefore that the Court of the Munsiff, to which the suit in question was transferred, must be deemed to be a Court of Small Causes, so at least, as to permit the trial of the said suit by such Court. What procedure the Munsiff should have adopted and what finality attaches to his decision, it is not necessary for the purpose of this rule to determine.

In the view we take this rule must be discharged with costs, the hearing-fee being assessed at one gold mohur.

A. N. R. C.

Rule discharged.

(1) (1912) I. L. R. 38 Mad. 25. (2) (1916) 15 All. L. J. 69.

(3) (1904) I. L. R. 31 Calc. 1057.

Before Sir Charles Chitty, Knight, Judge, and Mr. Justice Smither.

NANDO LAL GANGULI

v.

KHETRO MOHAN GHOSE.*

CIVIL.

1918.

January, 25, 18.

Calcutta Improvement Act (V of 1911, B. C.), Secs 70, 71, 77—Tribunal under the Act, if a Court—Criminal Procedure Code (Act V of 1898) Sec. 195—Sanction to prosecute.

The Tribunal constituted under the Calcutta Improvement Act is a Court within the meaning of section 195 of the Code of Criminal Procedure.

Raghoobans Sahoy v. Kokil Singh (1) and Chandt Charan Giri v. Godadhar Prodhan (2) referred to.

Civil Revision.

An application was made by the Petitioner, Nanda Lal Ganguli, to the President of the Calcutta Improvement Tribunal for sanction to prosecute one Khetra Mohan Ghose for giving false evidence in two apportionment cases which were heard together and decided by the President sitting alone. The President having held that the Tribunal was not a Court in the ordinary acceptance of that word, was of opinion that he had no jurisdiction to entertain the application, and as such rejected the application.

Against that order the applicant moved the High Court, and obtained the rule.

Babus Atulya Charan Bose and Monmotho Nath Pal for the Petitioner.

Babu Monmotho Nath Mukherjee for the Opposite Party.

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The judgment of the Court was as follows :

January 25.

An application was made to the President of the Tribunal constituted under the Calcutta Improvement Act 1911, for sanction to prosecute one Khetra Mohan Ghose for giving false evidence before the President of the Tribunal in two apportionment cases. The President held that he had no jurisdiction to entertain the application on the ground that the Tribunal was not a Court within the meaning of section 195, Criminal Procedure Code. Against that decision the applicant obtained this rule, and Khetra Mohan Ghose has appeared by pleader and shown cause against it. The opinion

*Civil Revision No 2 of 1918, against the order of S. C. Banerjee Esq., President, Calcutta Improvement Tribunal, dated the 6th December, 1917.

(1) (1890) I. L. R. 17 Calc. 874.

(2) (1917) 22 C. W. N. 165.

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of the President appears to be based upon the decision in *Hari Pandurang v. Secretary of State for India in Council and others* (1), where it was held that the Bombay Tribunal was not a Court but merely a body of arbitrators not subject to the supervision of the High Court. It was no doubt on account of this decision that Act XIV of 1904 was passed by the Imperial Legislative Council. In the case of Calcutta the Tribunal is constituted by the Calcutta Improvement Act, 1911, but the finality of its decisions is regulated by that Act as modified by the Calcutta Improvement (Appeals) Act, 1911, passed by the Imperial Legislative Council. It is unnecessary for us to discuss the question whether in view of the subsequent legislation the Bombay decision is still good law, as we have no doubt whatever that the Calcutta Tribunal is a Court within the meaning of section 195 of the Criminal Procedure Code. By section 70 of the Calcutta Improvement Act the Tribunal is constituted for the purpose of performing the functions of the Court in reference to the acquisition of land for the Board under the Land Acquisition Act 1894. By section 71 (a) the Tribunal shall (except as to appeals which are specially provided for) be deemed to be the Court and the President the Judge under the said Act. Section 71(c) gives the President the powers of a Civil Court with regard to the summoning and attendance of witnesses and production of documents. By section 77(b) apportionment cases may be tried by the President sitting alone and his decision is then to be deemed to be the decision of the Tribunal.

It has been held by this Court that the word "Court" in section 195 has a wider meaning than a Court of justice as defined in the Indian Penal Code. It may include a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination. See *Raghoobuns Sahoy v. Kokil Singh* (2), where the question arose whether a Collector acting under sections 69 and 70 of the Bengal Tenancy Act was a Court. That case was followed in *Chandi Charan Giri v. Godadhar Pradhan* (3), where the question was to what Court the Collector was subordinate. We may also refer to the definition of "Court" in section 3 of the Evidence Act. It includes all Judges and Magistrates and all persons except arbitrators legally authorised to take evidence.

We do not think that the Tribunal as "the Court" under the Land Acquisition Act 1894 for the purposes of the Improvement

(1) (1903) I. L. R. 27 Bom 424.

(2) (1890) I. L. R. 17 Calc. 872.

(3) (1917) 22 C. W. N. 165.

Trust can be regarded simply as a body of arbitrators. It is the Court under that Act, and the President is the Judge. It follows that it must also be regarded as a Court for the purposes of section 195 of the Criminal Procedure Code. We may point out that if the contrary view were to prevail, the deplorable result would follow that any private person who alleged that false evidence had been given before the Tribunal might institute a prosecution without any control on his action by the Tribunal before whom the evidence was given.

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The rule is accordingly made absolute, the order of the President is set aside, and the application remanded to him for adjudication upon the merits.

A. N. R. C.

Rule made absolute.

CRIMINAL REVISION.

*Before Sir Charles Chitty, Knight, Judge, Mr. Justice Tennon and
Mr. Justice Richardson*

SHEIKH SAJUDDI MANDAL AND OTHERS,

v.

F. L. CORK AND OTHERS.*

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Criminal Procedure Code (Act V of 1898), Sec. 145, proceedings under—Magistrate's refusal to look into documentary evidence—Title, evidence of—Possession of a part of the disputed property, if evidence of possession of the whole—Conclusion, not supported by evidence—Irregularity—High Court, interference by—Government of India Act, 1915, Sec. 107.

Per Chitty and Richardson, JJ. (Tennon J. Contra)—The refusal of a Magistrate to accept or look at any documentary evidence and evidence of title, in a proceeding under section 145 of the Code of Criminal Procedure, is not a material irregularity justifying the interference of the High Court in the exercise of its power of superintendence under section 107 of the Government of India Act

Sukh Lal Sheikh v. Tara Chand Ta (1), Khosh Mahomed Sirkar v. Nazir Mahomed (2), Krishna Kamini v. Abdul Jubbor (3), Kadar Bukhish Khan v.

* Criminal Revision, No. 994 of 1917, against the order of H. P. V. Townsend Esq., Joint Magistrate of Asansol, District Burdwan, dated the 16th July, 1917.

(1) (1905) I. L. R. 33 Calc. 68.

(2) (1905) I. L. R. 33 Calc. 352.

(3) (1902) I. L. R. 30 Calc. 155.

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Fusceep-oom-Nissa (1), *Maharajah Moheshur Sing v. The Bengal Government* (2), *Kali Kristo Thakur v. Golam Ali Chowdhry* (3), and *In re Pandurang Govind Pujari and others* (4) referred to.

The question how far possession of a part of a coal mine is evidence of possession of the whole is primarily a question of fact.

Glyn v. Howell (5) referred to.

High Court cannot interfere with an order passed under section 145 of the Criminal Procedure Code on the ground of an error committed by the magistrate as to the conclusion drawn from the evidence on the record, as it cannot be put higher than an error of law, and cannot be described as an irregularity, and does not go to the jurisdiction.

Criminal Revision.

Application by the second party in a proceeding under section 145 of the Code of Criminal Procedure, praying that the orders of the Magistrate declaring the first party to be in possession of the underground minerals of the disputed property until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction, may be set aside.

The material facts and arguments will appear sufficiently from the judgments.

Babus Dasarathi Sanyal and *Bankim Chandra Mukherjee* for the Petitioners.

Babus Manmatha Nath Mukherjee, *Prabodh Chandra Chatterjee* and *Ambicapada Chowdhry* for the Opposite Party.

The following judgments were delivered :

Teunon, J.—This Rule is directed against an order made or purporting to be made under the provisions of section 145 of the Code of Criminal Procedure.

The parties to the proceedings were the Equitable Coal Company represented by Mr. Cork the Manager of their Jomaria Colliery, on the one side, and certain Mondals with their sub-lessees the Satpukuria Assansol Colliery Co. Ltd. represented by a Manager and an assistant Manager on the other.

The dispute was regarding the minerals and more particularly the coal underlying the surface of Mouza Bajaddipur and by his order of the 16th of July, 1917, the Sub-divisional Magistrate of Asansol has found possession with the 1st party, the Equitable Coal Co. Ltd., and has thereupon made the declaration contemplated by the section.

(1) (1853) 5 M. I. A. 413.

(2) (1859) 7 M. I. A. 283.

(3) (1881) I. L. R. 7 Calc. 46.

(4) (1900) I. L. R. 25 Bom. 179.

(5) (1909) 1 Ch. 666.

The mouza comprises an area of some 1,000 bighas and the zemindar, it is not disputed, is the Maharaja of Burdwan. Under him are certain Patnidars who in the years 1847 and 1849 granted permanent leases to the predecessors of the Mondals and next, in 1871 granted a Darpatni settlement to the Equitable Coal Co. This Company thus became the landlords of the Mondals.

By virtue of the leases and settlements just referred to, both parties, it appears, have claimed the sub-soil or mineral rights in the mouza, but to strengthen their position, in view of recent decisions of their Lordships of the Judicial Committee, on the 17th of April 1917, the Mondals, it has been admitted before us, obtained a grant of the said rights from the zemindar the Maharaja of Burdwan.

The present proceedings were initiated on the 27th of June 1917 and by three orders made on petitions of the 12th and 13th July the Subdivisional Magistrate declined to accept or look at any documentary evidence on either side.

The contentions advanced on behalf of the petitioners (the Mondals and the Satpukuria Co.) then are, first, that by shutting out in this manner all documentary evidence and evidence of title the Sub-divisional Magistrate has acted with material irregularity and has thereby greatly prejudiced the petitioners, and, second, that his order in fact proceeds on no evidence.

It is admitted that neither party has in fact worked coal in this mouza. In 1915 however by two borings, the first begun in March of that year and the second at a later date, the exact date not being given, the Equitable Co. proved the existence of coal at a depth of some 400 feet. In March of the present year the company next began to sink two shafts at different points in the Mouza, but these shafts, it is admitted in the evidence, have not gone beyond a depth of some forty feet. It is not disputed that these proceedings on the part of the Equitable Company were contrary to the protests of the Mondals who were then and are still the owners in possession of the surface, or at least of the surface other than the sites of these two borings and two shafts. In fact in respect of the first boring, or of its site on the surface, the Mondals immediately brought a suit under the provisions of section 9 of the Specific Relief Act. This suit was contested by the Equitable Company, but was eventually decided *ex parte* in favour of the Mondals on the 7th of January 1917. An attempt by the defendant Company to have this *ex parte* decree set aside failed in May of the present year and possession under the decree was in that month given to the plaintiff Mandals. The

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second boring it will be observed was begun and completed, and the two shafts begun during the pendency of the said litigation.

The Magistrate's finding and order are based solely on the making of those two borings and these two inchoate shafts.*

It is true that just as by his order of the 12th and 13th July the Magistrate shut out all evidence of the petitioners' title he likewise deprived the opposite party of any opportunity of proving their title if they possess one. But it has not been suggested before us that their lessors the Putnidars in their patni lease or otherwise had obtained any specific grant of the mineral rights from the zemindar while it is admitted that in April 1917, the title to the mineral rights if up to then still in the zemindar, was conferred upon the Mondals. It has however been urged that this title-deed of April 1917, is not amongst the documents enumerated in the petition presented by the Mondals or the Satpukuria Colliery on the 12th of July. That is so, but that petition was not necessarily exhaustive and to tender their documents of title after the Magistrate's orders of the 12th and 13th July would have been futile. Further the petitioners did include correspondence said to contain important admissions by the Managing Agents of the Equitable Coal Co.

To exclude all evidence of title, and from two borings and two inchoate shafts, all *prima facie* were acts of trespass, to find possession of the minerals underlying a surface of 100 bighas with a person who has shown no title is in my judgment to ignore all the principles on which questions of possession in respect of unworked minerals are to be determined.

In this view, in my opinion, both contentions of the petitioners should be sustained and the order complained of set aside.

Richardson, J.—It must be assumed that these proceedings under section 145 of the Criminal Procedure Code were duly initiated by the Magistrate. There is no dispute as to that and it follows that the Magistrate had jurisdiction to enter upon the inquiry and to make such an order as the section contemplates. The question is whether he was so miscarried in the course of the inquiry as to justify this Court in interfering in the exercise of its powers of superintendence under section 107 of the Government of India Act, proceedings under section 145 being expressly excluded from the scope of the revisionary powers conferred by section 435 of the Code. This exclusion dates from the Code of 1898, and the effect is to limit the grounds on which this Court will interfere. Reference may be made to the Full Bench cases of *Sukh Lal Sheik v. Tara Chand*

Ta (1), and *Khosh Mahomed Sirkar v. Nasir Mahomed* (2), and also to the case in the Patna High Court of *Parmeshwar Singh v. Kailaspati* (3).

Now what is it that after the initiation of the proceedings the Code requires of the parties concerned and the Magistrate? The parties under clause (1) of section 145 are to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. Then clause 1 directs the Magistrate without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute to peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the initial order in actual possession. The Magistrate is therefore to decide if possible, the question of actual possession. Whether it is, or is not, possible to decide that question on the material before him, is, I conceive, for the Magistrate to determine. But his decision has to be arrived at without reference to the merits of the respective claims to a right to possession and I add that as I understand the words the claim of any party to a right to possession is the title to possession which that party sets up. A party is clearly not entitled to succeed before the Magistrate merely upon the merits of his title.

In the present case, the Magistrate has found it possible to decide, and has decided that the first party are in possession and has made an order accordingly. It is said that his proceedings are vitiated by irregularity. I will assume that the High Court will interfere not only when the Magistrate has acted without jurisdiction or in excess of his jurisdiction but also when he has committed a material irregularity resulting in prejudice to a party before him. The irregularity complained of is that the Magistrate said that he would not "look at" the documents of either side. That may mean merely that in the Magistrate's opinion the documents which the parties had brought into Court were irrelevant or of no assistance in deciding the question of actual possession. If that be so, the Magistrate possibly may have committed an error of law or an error of judgment, but there was no material irregularity in his procedure. On the contrary, if the documents were tendered merely for the purpose of obtaining a decision on the question of title, his refusal to look at them may have been entirely justified. But let it be as-

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(1) (1905) I. L. R. 33 Calc. 68.

(2) (1905) I. L. R. 33 Calc. 352.

(3) (1916) 1 Pat. L. J. 336.

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sumed that there was some irregularity in the mode of his refusal, the question still remains, was either party prejudiced?

As to the titles, so far as I can see, the respective titles set up by the parties in their written statements, which the Magistrate is expressly directed to peruse, were taken for granted and were not really in dispute. There was no dispute that the first party, the Equitable Coal Company, were the darpatnidars and no real dispute that the second party consisted of Mukararidars, who held under the first party, and of a Company named the Satpukhuria Asansole Collieries to whom the Mukararidars have subleased their rights. There was no dispute that on the 16th April, 1917, whatever the effect of the grant might be, the Mukararidars had obtained a lease of the mineral rights from the Maharajadhiraj of Burdwan. There was no dispute again that the first party had sunk two borings in the disputed land and certain shafts or inchoate shafts. The first boring was made in February or March, 1916, and shortly after the mukararidars instituted a civil suit against the first party. The Magistrate did consider the result of that litigation and came to the conclusion rightly or wrongly that the final decree related only to the surface rights and did not affect the underground rights. No suggestion was made to the Magistrate and none has been made to us that any person other than the first party had worked or attempted to work the coal under the surface.

As to the documents, the second party seems to have acquiesced in the Magistrate's order concerning them. The only complaint they subsequently made in the Court below was that the Magistrate was looking at documents of the other side, a charge which the Magistrate repelled. Further we have not been referred to any document, which throws any additional light on the question of actual possession. It is said that in some leases granted by the mukararidars to their agricultural tenants they reserved the minerals. How does that carry the matter any further?

To the best of my judgment, the Magistrate had all the material facts before him, and the substantial ground of complaint is in truth not that the Magistrate refused to look at any documents, but that he drew a wrong conclusion from the facts.

What the Magistrate did was to infer from the sinking of the two borings and certain shafts by the first party that they were in possession of the whole of the underlying coal. It may be that if the title is taken into account the conclusion is not warranted by the facts, and that if the same conclusion had been arrived at in a Civil Court, where the title was open for consideration, the question would have

arisen whether there was any evidence legally sufficient to support it. But the Magistrate had to decide without reference to the title. It appears from his judgment that he treated the whole of the coal in dispute as one parcel. He found that the first party had done certain possessory acts and he therefore awarded them possession of the whole. If the title be disregarded, the conclusion seems natural enough, but let it be assumed that it was wrong. What was the nature of the error committed? The question how far possession of a part is evidence of possession of the whole is primarily a question of fact, and it is not always an easy one. The latest pronouncement on the subject in England in connection with coal mines seems to be the judgment of Eve J. in *Glyn v. Howell* (1). The question whether there is any evidence to support the conclusion is no doubt a question of law but it is nothing more. The error therefore, cannot be put higher than this that the Magistrate was mistaken in his law. Such error cannot be described as an irregularity and it does not go to the jurisdiction. The Magistrate had jurisdiction to decide wrongly as well as to decide rightly. This Court is not in a position to instruct the Magistrate to find possession with one party rather than with the other.

Personally on the available facts I should find it difficult to decide that any one was in actual possession of the unworked coal. If, without expressing any opinion on, or prejudging the rights of, the parties, it be assumed, in view of recent decisions of the Privy Council and of this Court that *prima facie* the right to possess the minerals or the legal possession thereof, so far as no other person was in actual possession, was with the Maharaja of Burdwan till the 16th April, 1917, and after that date with the Mukararidars or their sub-lessees, I find it difficult to say that the unworked coal was ever reduced into actual possession by any one. The legal or constructive possession seems to depend entirely on the title and the written statements of the parties show that the determination of the title may involve question of some complicity. It may be that the Magistrate would have been better advised if he had adopted the alternative course provided by section 146 and attached the land. But if he had done so would the second party have been in a better position?

It is not suggested that the Magistrate has erred wilfully. What really is suggested is that he should have decided in favour of the second party on the ground that they have the better title or a better claim to a right to possession and on that ground possession should

(1) (1909) 1 Ch 666.

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have been attributed to them. As I have already said the Magistrate was precluded by the Code from referring to the merits of that claim. The reason for the prohibition is that before possession can be awarded merely in virtue of the true title the true title must be determined and that may involve, as it does in the present case, a difficult inquiry for which a Criminal Court is ill-adapted. Section 145 is the successor of similar provisions in earlier Acts: see Counsel's address in *Krishna Kamini v. Abdul Jubbar* (1). All have contained this prohibition and its force has been recognised by high authority. In reference to a case which came before the Privy Council in 1853 not directly but in connection with the subsequent Civil litigation, their Lordships put into the mouth of the Magistrate much the same words as the Magistrate in the present case has used. They said: "Observe, that from the first period of these disputes, although the possession only was in question, it was quite obvious that the persons who had the title would necessarily or very naturally, when the title is claimed by the opposite party, state their title. The Court says, I cannot look at that, the possession is now the only question, and therefore if your title is not clothed with possession, you must go to another Court to establish that title." *Kadir Bukhsh Khan v. Fusseeh-oon-nessa* (2). So, in *Maharajah Moheshur Singh v. The Bengal Government* (3), referring to the proceedings in the Foujdari Court, their Lordships said, "we apprehend that the jurisdiction of that Court is confined to cases of possession and that it is beyond their province to inquire into and ascertain the titles to landed property." In *Kali Kristo Thakur v. Golam Ali Chowdhry* (4), Field J. said "evidence of title though it may supplement and support direct evidence of possession cannot standing alone, be proof of possession. In *Pandurang's* case (5), Sir Lawrence Jenkins C.J. emphasized the necessity of limiting the enquiry, "to the issues with which alone the section empowered a Magistrate to deal, that is to say, the actual fact of possession, as distinct from any question of rights." It was said that the Magistrate could take no action on any conclusion at which he might arrive as to the respective titles of the parties. In *Kishna Kamini v. Abdul Jubbar* (1), a Full Bench case, the principal judgment was delivered by Hill J. who said that the Magistrate was not concerned to ascertain what persons have or claim to have mere rights to possession.

(1) (1902) I. L. R. 30 Calc. 155 (168, 201).

(2) (1853) 5 M. I. A. 413 (424).

(4) (1881) I. L. R. 7 Calc. 46.

(3) (1859) 7 M. I. A. 283 (309).

(5) (1900) I. L. R. 25 Bom. 179.

In *Ram Dyal Mahton v. Kedar Nath* (1), this Court set aside the Magistrate's proceedings because he had exceeded his jurisdiction in referring to the merits of the titles of the parties. If when a Magistrate refuses to look at documents of title, his proceedings are to be set aside on the ground of irregularity, and if when he does look at them, his proceedings are to be set aside on the ground of jurisdiction, Magistrates will find themselves in a difficult position.

The remedy provided by the Code itself for a party aggrieved by the Magistrate's decision is an appeal to the Civil Court. In my opinion the sooner the present dispute is taken to the Civil Court, which alone can finally pronounce upon the rights of the parties, the better it will be. If the title of the second party is as clear as it is now represented to be, they should have no difficulty in establishing it.

I differ from my learned brother with much regret but in my opinion the rule should be discharged.

[Owing to this difference of opinion, the case was referred to the Chief Justice under section 429 read with section 439 of the Code of Criminal Procedure, and it was then laid before Mr. Justice Chitty for final disposal.]

Babu Bankim Chandra Mukherjee for the Petitioners.

Babu Manmatha Nath Mukherjee for the Opposite Party.

C. A. V.

The following judgment was delivered by

Chitty, J.—This is a rule granted to the petitioner, who may be called the Mandals, calling on the District Magistrate of Burdwan and the opposite party *i.e.* the Equitable Coal Company to show cause why, on the grounds set out in the petition, the order under section 145 Criminal Procedure Code passed by the Magistrate should not be set aside. The matter came before Mr. Justice Teunon and Mr. Justice Richardson; and the learned Judges having differed in opinion the case has been laid before me for my opinion. I have had the advantage of reading the judgments of both the learned Judges and yesterday heard arguments in the matter. It will be enough for me to say that I agree with Mr. Justice Richardson in the conclusion to which he has come, namely, that the Rule should be discharged, for the reasons which he has given. It appears to me that in this case there was no such material irregularity on the part of the Magistrate in the exercise of the jurisdiction, which he undoubtedly possessed, as would justify interference by this Court. The objection of the petitioner is that the Magistrate

(1) (1907) 6 C. L. J. 182.

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refused to go into evidence of title, or rather to look at their documents of title. The refusal of the Magistrate to look at the documents of title was expressed not on an application of the petitioners but on an application of the opposite party: But there was no question in this case, as to the claim of either party or the respective title which they set up. The real question and the only question—before the Magistrate was who was in actual possession of these under-ground minerals. It may be that the Magistrate would have exercised a wiser discretion if he had passed orders under section 146 Criminal Procedure Code having regard to the fact that there was not very cogent evidence of possession on either side; but that was a matter in his discretion, and there undoubtedly was some evidence of possession on which he was competent to form an opinion. I therefore hold that the rule should be discharged.

A. N. R. C.

Rule discharged.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Beachcroft.

ISWAR CHANDRA BERA

v.

KALI CHARAN SANTRA AND OTHERS.*

*Rent, suit for—Land Registration Act (VII B. C. of 1876), Secs. 78, 81—
‘Malikana’—‘Written contract.’*

Where the sum recoverable by the plaintiff was described in a putni lease as ‘Malikana’ but the lease showed that it was in essence rent and was made expressly recoverable by the summary procedure prescribed in the Putni Regulation :

Held, that section 78 of the Land Registration Act was applicable to a suit for recovery of arrears.

The term ‘written contract’ mentioned in section 81 of the Land Registration Act, refers to a contract between the person who claims rent as proprietor and the person who is bound to pay rent to him under section 78. Section 81

* Appeal from Appellate Decree No. 1995 of 1914, against the decree of Babu Achinta Nath Mitter, Subordinate Judge of Midnapore, dated the 16th April, 1914, modifying that of Babu Jnanendra Mohan Das, Munsiff of Midnapore, dated the 27th November, 1912.

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has no application to a case where the written contract was between the defendant, the person bound to pay rent and the proprietor from whom the plaintiff claims to have derived title as usufructuary mortgagee : *Bhugwan v. Raghunath* (1) referred to.

Appeal by the Plaintiff.

Suit for recovery of arrears of rent.

The material facts and arguments appear from the judgment.

Babu Mohini Nath Bose for the Appellant.

Babu Saroda Charan Maity for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent. The trial Court decreed the claim in full ; the lower appellate Court has reduced the amount by one-half.

The plaintiff seeks to recover arrears of rent as transferee of a usufructuary mortgagee from the proprietor, who had previously granted a putni lease to the first defendant. The tenant resists the claim on the ground that under section 78 of the Land Registration Act, the plaintiff is not entitled to rent in excess of the share for which he has registered his name in the collectorate. This raises three questions ; first, is the amount claimed "rent" within the meaning of section 78 ; secondly, is the plaintiff "mortgagee" within the meaning of that section ? and, thirdly, is the plaintiff entitled to the benefit of section 81 ?

As regards the first point, the plaintiff contends that the amount he seeks to recover is described as 'malikana' in the putni lease, and, cannot consequently be regarded as "rent" within the meaning of section 78, on the authority of the decision in *Syed Shah Najamuddin Hyder v. Syed Zahid Hossein* (2). That decision is of no assistance to the plaintiff. It was there ruled that section 78 of the Land Registration Act is no bar to the recovery of "Malikana" which is not "rent." The Malikana claimed in that suit fell within the description given by Sir Barnes Peacock, C. J. in the case of *Bhuli Sing v. Nimu Behu* (3), namely, the amount of profits of an estate payable to the proprietor who has been deprived of possession by the government by reason of his neglect or failure to come in and take settlement. Here, the sum recoverable by the plaintiff is, no doubt, described in the putni lease as "malikana," but the lease shows that it was in essence rent and was made expressly

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(1) (1909) 11 C. L. J. 477.

(2) (1907) 8 C. L. J. 300.

(3) (1869) 4 B. L. R. 29 A. C.

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recoverable by the summary procedure prescribed in the Putni Regulation of 1819. The first question must accordingly be answered against the appellant.

As regards the second point, there is no room for controversy that the plaintiff is a mortgagee. The proprietor executed a usufructuary mortgage in favour of the vendor of the plaintiff and the conveyance which is the foundation of his title shows that he has purchased the interest of the usufructuary mortgagee. The second question also must be decided against the appellant.

As regards the third point, the plaintiff relies upon section 81 of the Land Registration Act which is in these terms: "Nothing contained in the three last preceding sections shall be held to interfere with the conditions of any written contract or to prevent any person deeming himself entitled to any sum of money from recovering such sum by due process of law from any other person who has received the same." Now the "written contract" mentioned in section 81 refers obviously to a contract between the person who claims rent as proprietor and the person who is bound to pay the rent to him under section 78: *Bhugwan v. Raghunath* (1). In the case before us, there is no written contract of tenancy between the defendant and the plaintiff. There is no doubt a written contract between the defendant and the proprietor from whom the plaintiff claims to have derived title as usufructuary mortgagee. A case of this description does not, in our opinion fall within section 81, which is consequently of no avail to the plaintiff.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1909) 11 C. L. J. 477.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Beachcroft.*

In re ATUL CHANDRA GUPTA.*

*Re ision—Order made by District Judge in administrative capacity—Bengal
Civil Courts Act (XII of 1887), Sec. 35—Government of India Act, 1915,
Sec. 107.*

CIVIL.
1917.
April, 4.

The High Court cannot, under section 107 of the Government of India Act, 1915, set aside an order made by a District Judge under section 33 of the Bengal Civil Courts Act.

An order made by a District Judge under section 33 of the Bengal Civil Courts Act, in his administrative capacity is not clothed with a judicial character, merely because it is based on evidence taken by him.

Application under section 107 of the Government of India Act, 1915.

The petitioner was a Naib Nazir of the Court of the Munsiff of Habigunj and was dismissed by the District Judge of Sylhet on the ground that he had accepted a bribe.

The material facts are stated in the judgment.

Babu Probodh Kumar Das for the Petitioner.

The judgment of the Court was delivered by

April, 4.

Mookerjee, J.—This is an application of a novel character which invites us to set aside, in exercise of the powers of superintendence conferred upon this Court by section 107 of the Government of India Act 1915, an order under section 33 of the Bengal Civil Courts Act, 1887. The petitioner was Naib Nazir of the Court of the Munsiff of Habigunj, and was dismissed by the District Judge of Sylhet on the ground that he had accepted a bribe. He appealed to the Chief Commissioner of Assam who declined to interfere. He now comes up to this Court and invites us to interfere on the ground that the order of the District Judge was made without any opportunity afforded to him to prove his innocence. We are of opinion that an order under section 33 of the Bengal Civil Courts Act is not an order which can be set aside by this Court under section 107 of the Government of India Act 1915. That section confers on each of the High Courts superintendence over all courts for the time being subject to its appellate jurisdiction. The question, consequently arises, whether the District Judge, when he exercises the powers vested in him under section 33 of the

* Application against an order of H. C. Lidell Esq., District Judge of Sylhet, dated the 2nd September, 1916.

CIVIL.

1917.

*In re Atul Chandra.**Mookerjee, J.*

Bengal Civil Courts Act, is a Court subject to the appellate jurisdiction of this Court. In our opinion, the answer must be in the negative, as the order is made by the District Judge in his administrative capacity. Under section 30, he has authority to appoint ministerial officers in his Court and to remove or suspend them; under section 31, he has also authority to take similar action in respect of officers in Subordinate Courts. Section 33 then provides that the District Judge, subject only to the control of the Local Government, may, by order, suspend or remove any ministerial officer to whom section 31 or 32 applies and may, on appeal or otherwise, reverse or modify any order made under either of those sections by any court under his administrative control. It is manifest from the very phraseology used by the Legislature in section 33 that the order is made by the District Judge in his administrative capacity. An order so made is not clothed with a judicial character, merely because it is based on evidence taken by the judge. It is also clear that the order is subject only to the control of the Local Government. In our opinion, this application cannot be entertained by this Court and must be refused on that ground.

A. T. M.

Application refused

CIVIL RULE.

Before Mr. Justice Teunon and Mr. Justice Newbould.

CIVIL.

1918.

February, 1911.

BROJENDRA NATH MITRA

v.

ARMAN SHEIKH.*

Bengal Tenancy Act (VIII of 1885), Sec. 66 Cl. (2)—Non-occupancy raiyat, ejectment of—Decretal amount, payment of—Payment, by whom to be made—Payment by an under-raiyat, if can be accepted.

Section 66 clause (2) of the Bengal Tenancy Act contemplates that the payment made, to be a good payment, must be a payment by or on behalf of the judgment-debtor. The Court cannot, therefore, accept the tender of the amount by an under-raiyat in order to prevent the execution of the decree for the ejectment of the non-occupancy raiyat.

* Civil Rule No. 878 of 1917, against an order of S. C. Sen, Esq. Munsiff, 1st Court, Khulna, dated the 20th August, 1917.

Application made by the Plaintiff.

The material facts will appear sufficiently from the judgment.

Babus Sarat Chandra Roy Chowdhury and Satya Charan Sinha
for the Petitioners.

Dr. Jadu Nath Kanjilal for the Opposite Party.

The judgment of the Court was as follows :

In this case it appears that the petitioner before us brought a suit for rent against his tenant a non-occupancy raiyat and obtained a decree for a sum amounting to some 80 rupees and odd with an order providing under the provisions of section 66 (2) of the Bengal Tenancy Act that on failure of payment of that amount within 15 days from the date of the decree, the decree for ejectment should be executed. Thereafter the opposite party one Arman Sheikh claiming to be an under-raiyat under the non-occupancy raiyat the judgment-debtor tendered the amount due in order to prevent the execution of the decree for the ejectment of the non-occupancy raiyat. Having found the opposite party Arman Sheikh to be an under-raiyat the Munsiff accepted the deposit proceeding apparently on the analogy afforded by sub-section (3) of section 170 of the Bengal Tenancy Act. It is contended before us that the provisions of section 170 and subsequent sections of the Bengal Tenancy Act apply only in cases of sale and have no application in cases of decrees for ejectment under the provisions of section 66 (2). On behalf of the under-raiyat opposite party it is not contested that section 170 and the following sections have no direct application in the present case. But it is contended that under section 66(2) it is not specifically provided that the payment must be made by the judgment-debtor. It is suggested that the payment may be made by any third party and that such payment must be accepted by the landlord as good payment preventing the execution of his decree for ejectment. In support of that contention we have been referred to the provisions of section 114 of the Transfer of Property Act. But these provisions have no direct application here, and we cannot but hold that section 66(2) clearly contemplates that the payment made, to be a good payment, must be a payment by or on behalf of the judgment-debtor. Now in the present case the payment was not made on behalf of the judgment-debtor. On the contrary the deposit was offered by the opposite party Arman Sheikh expressly to protect his own interest and on the allegation that the judgment-debtor was in collusion with the landlord the decree-holder.

That being so we are of opinion that the Munsiff should not have

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accepted the tender by the under-raiyat opposite party. In coming to that conclusion we are not to be understood as deciding any question which may hereafter arise as to the recognition by the landlord of the opposite party as his tenant, or any question that may arise under section 85 of the Bengal Tenancy Act as to the validity of the sub-lease against the landlord. Those questions may be raised in appropriate proceedings.

For these reasons we make this Rule absolute, set aside the order of the Munsiff complained of and direct payment to the opposite party of the amount which has been deposited or paid by him into Court. Under the circumstances we make no order as to costs in this Rule.

A. N. R. C.

Rule made absolute.

Before Mr. Justice Beachcroft and Mr. Justice Walmsley.

CIVIL.

1917.

February, 19, 20.

BEHARI LAL BISWAS

v.

NASIMANNESSA BIBI.*

Putni—Deposit of putni rent by Durputnidar—Possession given to Durputnidar—Putni Regulation (VIII of 1819), Sec. 13—Putni rent, payment of, by Durputnidar—Rent, if can be added to demand

Under section 13 of the Putni Regulation, the defaulter can recover his tenure on repayment of the advance made with interest, or on proof that the advance has been realised from the usufruct. But the person making the advance, is not entitled to add to his demand the rent paid to the superior landlord for the years during which he has been in possession: *Lala Bharub v. Lalit* (1) referred to.

Application for revision under section 115 of the Code of Civil Procedure by the Durputnidar.

Suit to set aside a putni sale and for injunction to restrain the opposite party from taking possession.

* Civil Rule No. 65 of 1917, against the order of R. E. Jack, Esq., District Judge of Nadia, dated the 8th December, 1916, reversing that of Babu Srish Chunder Chowdhuri, Munsiff of Krishnagore, dated the 8th July, 1916.

(1) (1885) I. L. R. 12 Calc. 185.

The material facts and arguments appear from the judgment.

Babus Provas Chunder Mitter and Tarakeshwar Pal Chowdhuri
for the Petitioner.

Babus Ram Chunder Mozumdar and Probodh Chandra Chatterjee
for the Opposite Party.

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1917.

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v.

Nasimannea Bibi.

The judgments of the Court were as follows :

C. A. V.

February, 30.

Beachcroft, J.—The petitioner is the holder of a tenure under a putni tenure. In 1309 in consequence of a default by the putnidar the petitioner deposited the putni rent in order to save his tenure and was put in possession of the putni under section 13 of the Putni Regulation, to discharge his lien. The interest of the superior landlord was subsequently transferred and in May last the putni was sold at the instance of the new landlord, in spite, the petitioner says, of his having deposited the amount due as putni rent. The petitioner has brought a suit to have the putni sale set aside and pending suit applied for an injunction to restrain the opposite party, the purchaser of the putni, from taking possession.

The Munsiff issued an injunction as prayed, but on appeal the District Judge ordered the injunction to be dissolved on the opposite party depositing as she offered to do, the amount still due to the petitioner out of his original deposit, which he says has not yet been realised. The petitioner has obtained this Rule calling on the opposite party to show cause why the District Judge's order should not be set aside and why an injunction should not issue.

The grounds urged in support of the application are shortly that the petitioner has been in possession of the putni ever since 1909, that the balance of convenience is in favour of his being retained in possession because not only has he not succeeded in fully collecting rent from the tenants, but as he has been paying the superior landlord's rent for a number of years he has to recoup himself for such payments which amount to something like Rs. 10,000, and he is entitled to retain possession of the putni until he has recouped himself; and, finally, that if he succeeds in his suit he will be very much embarrassed and there will be a serious complication of accounts if he is dispossessed now.

The last argument may be applied with equal force if the opposite party is successful in the suit. She has already been kept out of possession for nearly a year since her purchase and will shortly again have to pay the putni rent, while up to date she had had no return on her purchase money.

CIVIL.

1917.

Behari

v.

Nasimannessa Bibi.

Beachcroft, J.

Prima facie the petitioner's rights have been secured by the order which the learned Judge has made. Under section 13 of the Putni Regulation the defaulter can recover his tenure on repayment of the advance made with interest, or on proof that the advance has been realised from the usufruct. But an attempt has been made, relying on the provision in clause 4 of section 13, to the effect that the person making the advance has a lien as if the loan had been made on mortgage, to establish the position that the person making the advance is entitled to add to his demand the rent paid to the superior landlord for the years during which he has been in possession. The argument is based on section 72 of the Transfer of Property Act, which declares the right of a mortgagee to take the necessary steps to preserve the mortgaged property. An exactly similar attempt to add payments on account of the putni rent to the debt was made in the case of *Lala Bharub Chandra Karpur v. Lalit Mohan Singh* (1), and proved unsuccessful. It is argued for the petitioner that the incidents which gave rise to that suit occurred before the passing of the Transfer of Property Act and therefore that decision must be taken to have been modified by section 72 of the Act. I am not aware that that section has given a new power to the mortgagee in possession, and the same view of section 13 of the Putni Regulation was taken in *Ramjiban Bhadra v. Tazuddin Kazi* (2), and *Jakkomull Mehera v. Saroda Prosad Dey* (3).

For the purposes of this rule it is not necessary to say more. I must, however, guard myself from being understood to hold, because I have dealt with the merits, that the application is maintainable under section 115 Civil Procedure Code. The opposite party objected that it was not, but in the view which I take of the merits of the application it is unnecessary to express any opinion on that point.

I think the Rule should be discharged with costs, 5 gold-mohurs.

Walmsley, J.—I agree.

A. T. M.

Rule discharged.

(1) (1885) I. L. R. 12 Calc. 185. (2) (1911) 15 C. W. N. 404.

(3) (1908) 7 C. L. J. 604.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

DWARIKA NATH ASH

v.

PRIYA NATH MALKI.*

Civil.

1916.

August, 25, 28.

Claim, if enforceable—Consideration moving from stranger—Debtor transferring property—Vendee agreeing to pay creditor out of consideration money—Agreement not made known to creditor.

P transferred his properties to W, who retained part of the consideration money in his hands and agreed to apply the sum in satisfaction of a debt due to G from P. The arrangement was not brought to the notice of G.

Held, that G could enforce his claim as against W : *Gregory v. Williams* (1), referred to.

Application for revision under section 25 of the Provincial Small Cause Courts Act by Defendant No. 3.

Suit to recover money.

The material facts are stated in the judgment.

Babus Surendra Chandra Sen and Hemendra Chandra Sen for the Petitioner.

Babus Nanda Lal Sarkar and Triloki Nath Pandit for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—The decision of this Rule turns upon an interesting point of law involved in the question whether or not the third defendant was liable for the debt due to the plaintiff from the first two defendants. It appears that the first two defendants borrowed a sum of money from the plaintiff on a promissory note executed on the 6th January, 1913. They transferred their properties to the third defendant on the 31st January 1913, and on that very date, the third defendant executed an agreement in favour of his vendors, expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hands. The plaintiff instituted this suit on the 4th January 1916 against his debtors as also the third defendant. The Small Cause Court Judge has decreed the suit against all the defendants.

August, 25.

* Civil Rule No. 582 of 1916, against an order of K. Gupta, Esq., Small Cause Court Judge of Khulna, dated the 20th April, 1916.

(1) (1817) 3 Mch. 582.

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1916.

Dwarika

Priya.

Mookerjee, J.

On behalf of the third defendant, it is urged in this Court that there was an interpolation in the deed of agreement executed by him, and that in fact the recital as to the debt due to the plaintiff from the first two defendants was inserted without his knowledge after the execution but before the registration of the document. This defence has not been believed by the Court below, and upon the findings of the Small Cause Court Judge, it is impossible for us to examine this question of fact. We must consequently proceed on the assumption that the third defendant did undertake to pay the plaintiff his dues out of the consideration money in his hands. The question is, whether the plaintiff is entitled to enforce the agreement made between the third defendant and his vendors.

On behalf of the plaintiff, reliance is placed upon the decision in *Debnarayan Dutt v. Chunilal Ghose* (1), which is an authority for the proposition that the rule enunciated in *Tweddle v. Atkinson* (2), is not applicable in this country and that an agreement may in certain circumstances be enforced by a stranger thereto, that is, in what may be briefly described as cases of trust, quasi-contract, or near relationship. See *Jahandar v. Ramlal* (3). The third defendant, however, seeks to distinguish that case on the ground that there the arrangement between the debtor transferor and the transferee was communicated to the creditor, whereas there is nothing to show that in the present case the arrangement between the first two defendants and the third defendant was ever brought to the notice of the plaintiff by either of them. In our opinion the distinction mentioned is not material and that the principle which underlies the decision in *Debnarayan Dutt v. Chunilal Ghose* (1), applies equally to the present case. In that case, there was a contention that the plaintiff was entitled to succeed on the ground of novation of contract, and, from this point of view, stress was laid upon the fact that the arrangement between the transferor and transferee had been communicated to the creditor. This Court, however, held that notwithstanding such communication, there was no novation of contract and that the suit must be deemed to have been instituted on the original debt. That this is the true view of the situation is clear from the decision in *Gregory v. Williams* (4), which was quoted with approval and followed in *Debnarayan v. Chunilal* (1). The circumstances of that litigation were, as nearly as possible, identical with those of the case before us. There, P transferred his properties to W, who retained the consideration

(1) (1913) I. L. R. 41 Calc. 137.

(2) (1861) 1 B. & S. 393.

(3) (1910) 11 C. L. J. 364 (368).

(4) (1817) 3 Mcr. 582.

money in his hands and agreed to apply the sum in satisfaction of a debt due to G from P and to appropriate the balance only in satisfaction of his own dues. The arrangement was intended to be communicated to G, but as a matter of fact was not brought to his notice. W on the other hand, communicated to G an untrue version of what had happened, and, as the report says, it was by a mere accident that G came to know of the arrangement between P and W. G along with P instituted a suit to recover the debt from W. The claim was resisted on the ground that the consideration had not moved from G, who was a stranger to the agreement between P and W and was entitled to no benefit thereunder. Sir William Grant^e M. R. overruled this contention. He conceded that the action might not have been maintainable in a Court of law, because the engagement was made to P and not directly to G, and the consideration was furnished by P. But he proceeded to hold that although, no party to the contract, G had an equitable right through the mediation of the agreement to P, as shown by a decision of Lord Hardwicke to the same effect. There had been no communication of the agreement between P and W to G; and no such communication was necessary, because the claim was not based in novation of contract on the allegation that by mutual arrangement of all the parties, a new agreement as between W and G had been substituted in supersession of the original agreement between P and G. The decision was based on the ground that W was in essence a trustee of the money in his hands for the benefit of G, who could clearly enforce it, whether or not the arrangement had been communicated to him by P or W.

Consequently, we must hold upon principle as also upon authority, that the plaintiff is entitled to enforce his claim as against the third defendant. The rule is discharged with costs, one gold mohur.

A. T. M.

Rule discharged.

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v.

Priya.

Mookerjee, J.

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice
Walmsley.*

CIVIL.

1917.

April, 26.

KUNJ BEHARI BURDHAN

v.

GOSTO BEHARI BURDHAN,*

Suit, maintainability of—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 15, 24—Suit to enforce an award.

A suit to enforce an award being in essence a suit for specific performance of a contract, is not cognizable in a Court of Small Causes: *Wood v. Griffith* (1) referred to.

Articles 15 and 24, second schedule of the Provincial Small Cause Courts Act, are to be read together.

Application for revision under section 25 of the Provincial Small Cause Courts Act by the Plaintiff.

Suit for recovery of money due under an award.

The material facts are stated in the judgment.

Babu Haradhone Chatterjee for the Petitioner.

Mr. D. N. Bose (Counsel) and *Babu Gour Mohan Dutt* for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—We are invited in this rule to set aside a decree of dismissal made by the Judge of a Court of Small Causes in a suit for recovery of money due under an award. The petitioner and the opposite party are brothers. On the 24th September, 1912, the petitioner instituted a suit against his brother for contribution, in respect of sums alleged to have been paid as Municipal rates on account of joint properties. During the pendency of this suit, the parties agreed to refer the matters in dispute to arbitrators. On the 14th March, 1913, they filed their submission in Court, whereby three men were nominated arbitrators to settle all disputes between them as regards their joint properties and to effect a partition thereof. On the 30th June, 1913, the arbitrators made an elaborate award, which contained a scheme for division of the joint properties, and gave directions for payment of sums of money by one of the parties to the other. On the 14th July, 1913, the Court proceeded to make a decree on the basis of the award, to the effect that the

* Civil Rule No. 8 of 1917, against the decision of Babu Asutosh Ghose, Small Cause Court Judge of Howrah, dated the 25th September, 1916.

(1) (1818) 1 Swanston 43 (54).

April, 26.

suit be dismissed in accordance therewith. There was also a clause that the award be treated as part of the decree ; but it is plain, that the Court did not enforce the terms relating to immovable property beyond its jurisdiction. The true effect of the order was that the award was recited in the decree which thereupon became judicial evidence of its terms. On the 23rd June, 1916, the petitioner instituted the present suit in the Court of Small Causes for recovery of a sum of money from the defendant in accordance with the award. Objection was forthwith taken that the award could not be enforced piecemeal. The Small Cause Court Judge has dismissed the suit and we are now invited to hold that his view is erroneous in law.

The first question for consideration is, whether a suit of this description for enforcement of an award is cognizable in a Court of Small Causes. The petitioner has argued on the authority of the decisions in *Simson v. McMaster* (1) and *Sukar Hajam v. Oli Mohammad* (2) that the answer should be in the affirmative ; but we are not prepared to accept this contention as sound in principle.

The second schedule to the Small Cause Courts Act specifies the classes of suits which are excluded from the cognizance of a Court of Small Causes. Art 15 and Art 24 exclude respectively suits for specific performance of contracts and suits to contest awards. The petitioner argues that as Art. 24 excludes specifically a suit to contest an award, the implication is that a suit to enforce an award is cognizable by a Court of Small Causes. We are of opinion that this contention is not well-founded, because a suit to enforce an award is in essence a suit for specific performance of a contract.

The nature of an award of arbitrators which has not been enforced judicially was explained by this Court in the case of *Bhajahari Saha Banikya v. Behari Lal Basak* (3). A suit for specific performance of an award is in essence a suit for specific performance of a contract, for as the parties have contracted to do what the arbitrator should direct, when the latter has given his decision the award may be considered in equity as an agreement by the parties on the terms set out by him and may be enforced against a party as his own agreement. This view is supported by the opinion of Lord Eldon L. C. in *Wood v. Griffith* (4) "that a bill will lie for specific performance of an award is clear, because the award supposes an agreement between the parties and contains no more than the terms of that agreement ascertained by a third person ; and then

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Mookerjee, J.

(1) (1890) I. L. R. 13 Mad. 344.

(2) (1914) 25 I. C. 826.

(3) (1906) I. L. R. 33 Calc 881.

(4) (1818) 1 Swanston 43 (54).

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the bill calls only for a specific performance of an agreement in another shape." Thus when X and Y refer matters in dispute between them to the arbitration of A and agrees to abide by his decision, as soon as the award has been given, there is a contract between the parties to abide by its term; in other words, from that moment, there is an agreement between the parties that their rights and liabilities would be regulated by the terms previously ascertained by the arbitrator. If, in these circumstances, one of the parties seeks enforcement of the terms of the award, he seeks in reality the enforcement of a contract between the parties: If this view were not taken, the position would be obviously anomalous. A brings a suit against B to enforce an award. According to the petitioner the suit is cognizable in a Court of Small Causes, although B may contest the validity of the award, and urge that it was made under circumstances which render its enforcement impossible in a Court of Justice. On the other hand, if B comes into Court first and sues to contest the award, the suit is admittedly not cognizable by a Court of Small Causes. This shows clearly that articles 15 and 24 should be read together, and if they are so interpreted, a suit for enforcement of an award is excluded from the cognizance of a Court of small causes because it is in its essence a suit for specific performance of a contract. We are not unmindful that a contrary view was taken in the cases of *Simson v. Mac-Master* (1), *Chimandas v. Manghoomal* (2), and *Sukar Hajam v. Oli Mohammad* (3), where, however, the question does not appear to have been fully argued in its various aspects. We hold accordingly that this suit was not maintainable in a Court of Small Causes. We are further of opinion that the suit as framed must fail on the merits. The plaintiff seeks in essence to enforce a part of an award, in fact that part alone which is favourable to him. He has not carried out what he is directed to perform under the award, which cannot be enforced in its entirety in a Small Cause Court, as it involves the partition of immovable property. In such circumstances, the plaintiff should not be allowed to proceed with the suit and obtain relief against the defendant, thereby to compel the latter to bring another suit in a Court of competent jurisdiction to enforce the award so far as it benefits him.

The result is that this Rule is discharged with costs,—one gold mohur.

A. T. M.

Rule discharged.

(1) (1890) I. L. R. 13 Mad. 344.

(2) (1912) 6 S. L. R. 85.

(3) (1914) 25 I. C. 326.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

SHEODARSANLAL BAJPAI

v.

JOGES CHANDRA ROY.*

CIVIL.

1917.

March, 30.

Restitution—Purchaser in execution of mortgage decree against plaintiff in a suit for possession, if representative—Possession given by decree—Decree subsequently reversed.

The plaintiffs, who were out of possession at the date of the institution of a suit for possession, obtained a decree in the primary Court. That decree was executed and they were placed in possession. Meanwhile, an appeal preferred by the unsuccessful defendant was decreed by the lower appellate Court and the decree for possession made by the trial Court in favour of the plaintiffs was therefore discharged. The decree of the appellate Court was confirmed by the High Court, and an appeal therefrom under clause 15 of the Letters Patent proved infructuous. In the interval, the present petitioner, had purchased the disputed property in execution of a mortgage decree obtained against the plaintiffs and was placed in actual possession of the purchased property by the Court. On reversal of the decree of the trial Court, the opposite party applied to be restored to possession by way of restitution :

Held, that for the purpose of transference of possession from the plaintiffs to the petitioner, the latter was a representative of the plaintiffs and the doctrine of restitution was applicable.

Garudhuj v. Baiju (1) referred to.

Application for revision.

Application for restitution of property by the Defendant.

The material facts are stated in the judgment.

Babus Biraj Mohan Mojumdar and *Probodh Kumar Das* for the Petitioner.

Babu Dhirendra Lal Kastgir for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—This is an application for restitution of property which formed the subject-matter of a litigation between Mahammad Ramjan and others as plaintiffs on the one hand and Joges Chandra Roy as defendant on the other. The plaintiffs were out of possession at the date of the institution of the suit. They obtained a decree in the Court of first instance on the 1st March 1912. That

March, 30.

* Application in the matter of Letters Patent Appeal No. 103 of 1916 in Appeal from Appellate Decree No. 314 of 1914.

(1) (1906) I. L. R. 28 All. 337.

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Mookerjee, J.

decree was executed and they were placed in possession. Meanwhile, an appeal had been preferred by the unsuccessful defendant. The appeal was decreed by the District Judge on the 27th September 1913 and the decree for possession made by the trial Court in favour of the plaintiffs was thereupon discharged. The decree of the District Judge was confirmed by this Court on the 6th April 1916, and, an appeal therefrom under clause 15 of the Letters Patent proved infructuous. In the interval, the present petitioner, Sheo Dursanlal Bajpai, had purchased the disputed property in execution of a mortgage decree obtained against the plaintiffs. He was placed in possession of the purchased property by the Court, and, as his judgment-debtors, were in possession by virtue of the execution of the decree in this suit, he got actual possession of the property. On reversal of the decree of the trial Court by the District Judge, Jogesh Chandra Roy applied to be restored to possession by way of restitution. This application was granted. The petitioner now contends that this order was erroneous and that as he is in no way bound by the decree of the District Judge, his possession should not have been disturbed. In our opinion there is no foundation for this contention.

It is needless for us to decide whether the petitioner is or is not bound by the decree of the District Judge in the events which have happened and which need not be set out in detail for the present purpose; that will probably form the subject of investigation in a separate suit between the parties. But one position is perfectly obvious. For the purpose of transference of possession from the plaintiffs to the present petitioner, the latter is unquestionably a representative of the plaintiffs. Indeed, if the plaintiffs had not recovered possession from the defendant Jogesh Chandra Roy by execution of the decree of the Court of first instance, which was ultimately reversed on appeal as erroneous, the petitioner would never have been in possession. Consequently, he cannot possibly maintain the position that notwithstanding the reversal of the decree of the trial Court by the District Judge, he is entitled to continue in possession as against the successful litigant. If his contentions were to prevail, the result would be that the doctrine of restitution might cease to be available to every successful litigant, as, during the pendency of the litigation, possession might be transferred by his opponent to a stranger. The view we take is supported by the decision in *Garurdhuj Prosad Singh v. Baiju Mal* (1). In that case the claim for possession was dismissed in the Court of first

(1) (1906) I. L. R. 28 All. 337.

instance, but was decreed on appeal to the High Court. During the pendency of an appeal to His Majesty in Council, the decree of the High Court was executed, and the plaintiff was placed in possession. The property was then sold in execution of a money decree against the plaintiff and passed into the hands of a stranger. The successful appellant before the Judicial Committee then applied to be restored to possession by way of restitution, and the question arose whether the purchaser of the right title and interest of the plaintiff during the pendency of the litigation was not liable to be called upon to give up possession precisely in the same manner as the plaintiff himself. The question was answered in the affirmative and the result was that the purchaser was deprived of possession by way of restitution in favour of the defendant, who obtained a reversal of the decree of the High Court before the Judicial Committee. This view is in accord with the decision in *Gulzarilal v. Madho Ram* (1) and is completely destructive of the position taken up by the petitioner.

The result is that this application is refused with costs one gold mohur.

A. T. M.

Application refused.

(1) (1904) I. L. R. 26 All. 447.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Walmsley.*

BROJENDRA LAL DAS AND OTHERS

v.

DEB NARAIN TEWARI AND ANOTHER.*

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Revenue sale—Chowkidari chakran land, if passes—Chakran land treated as separate—Original estate sold for arrears of revenue.

Chowkidari chakran lands form part of the original estate, and, when they are resumed and transferred to the Zemindar, the latter does not acquire thereby a new estate: *Raja Ranjit v. Kali Dasi* (1) referred to.

* Appeal from Appellate decree No. 963 of 1913, against the decision of Babu Hari Prosonno Mukerjee, Subordinate Judge of Burdwan, dated the 29th November, 1912, affirming that of Babu Rash Behari Mookerjee, Munsiff of Burdwan, dated the 30th August, 1911.

(1) (1917) 25 C. L. J. 499 P. C.

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Where the Collector treated the enfranchised chowkidari chakran lands as constituting by themselves a separate estate subject to the payment of a separate assessment made under the Village Chowkidari Act, and the original estate as created at the time of the Permanent Settlement was treated as a separate estate and was exposed for sale for recovery of arrears due therefrom, the sale being not for the recovery of the amalgamated revenue :

Held, that the purchaser at the revenue sale did not acquire title to the Chowkidari chakran land.

Appeal by the Defendants.

Suit for recovery of possession of immovable property on declaration of title.

The material facts are stated in the judgment. •

Babu Ram Chunder Mosumdar for the Appellants.

Babus Divarka Nath Chuckerbutty and *Gopal Chunder Chuckerbutty* for the Respondents.

The judgment of the Court was delivered by

May, 22.

Mookerjee, J.—This is an appeal by the defendants in a suit for recovery of possession of immovable property on declaration of title. The lands in dispute were originally Chowkidari chakran lands, which were resumed under the provisions of the Village Chowkidari Act, 1870, and were transferred to the plaintiffs on the 2nd February, 1900. Since then, the proprietors of the estate have defaulted to pay Government revenue, with the result that the parent estate was sold on the 17th March, 1907, when it was purchased by the appellants. The plaintiffs contend that their title to the Chowkidari chakran lands was not affected by the sale of the parent estate and that they are consequently entitled to recover possession thereof. The defendants, on the other hand, maintain that the sale under the provisions of Act XI of 1859 transferred to them, not merely the lands comprised in the parent estate but also the resumed Chowkidari chakran lands. The Courts below have concurrently negatived this contention on the authority of the decision in *Kashim Sheik v. Prasanna Kumar Mukerjee* (1). The correctness of that decision, however, has been called in question, and, our attention has been drawn to the cases of *Kazi Newaz Khoda v. Ram Jadu Dey* (2), *Hareck Chand Babu v. Charu Chandra Sinha* (3), and *Rakhaldas Mukerjee v. Madhab Chandra Singha* (4). In our opinion, there is no room for controversy upon

(1) (1906) I. L. R. 33 Calc. 596.

(2) (1906) I. L. R. 34 Calc. 109; 5 C. L. J. 33.

(3) (1910) 13 C. L. J. 102; 15 C. W. N. 5.

(4) (1910) 13 C. L. J. 109.

one fundamental question decided by the Judicial Committee in the case of *Raja Ranjit Singh v. Srimati Kali Dasi Debi* (1), namely that Chowkidari chakran lands form part of the original estate, and, when they are resumed and transferred to the zemindar, the latter does not acquire thereby a new estate as was erroneously laid down in *Kasim Sheik v. Prasanna Kumar Mukerjee* (2). The Village Chowkidari Act recognises, the existing title of the zemindar to the lands resumed, and the estate taken by him under the order of transfer is in confirmation and by way of continuance of his existing estate: This proposition, however, is of no real assistance to the appellants, for as purchasers, they can claim title only to what has been actually exposed for sale by the Collector. In the case before us, it is clear, that the Chowkidari chakran lands have not been sold by the Collector; consequently, the appellants have acquired no title to such lands by their purchase. Indeed, the state of facts here is identical with what was foreshadowed in the case of *Kazi Nawaz Khoda v. Ram Jadu Dry* (3). The revenue authorities have treated the parent estate as divided into two, namely, one comprising all the lands of the parent estate except the Chowkidari chakran lands and the other including the Chowkidari chakran lands: *Rakhaldas v. Madhub Chandra* (4). The revenue authorities have thus substituted two distinct estates in place of what originally constituted one integral estate. Whether this was or was not the necessary consequence of the provisions of the Village Chowkidari Act, we need not discuss on the present occasion; We are concerned only with the legal effect of what has actually taken place. The Collector has treated the enfranchised Chowkidari chakran lands as constituting by themselves a separate estate subject to the payment of a separate assessment made under the Village Chowkidari Act, 1870. The residue of the original estate as created at the time of the Permanent Settlement has been treated as a separate estate, and that alone was exposed for sale for recovery of the arrear due therefrom. The sale was not held for the recovery of the amalgamated revenue, namely, the revenue assessed at the time of the Permanent Settlement and the subsequent assessment made at the time of the resumption under the Village Chowkidari Act nor was the amalgamated estate brought to sale. In these circumstances, it is clearly impossible to maintain the position that the purchaser at the revenue sale has acquired

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(1) (1917) 25 C. L. J. 499; 21 C. W. N. 609.

(2) (1906) I. L. R. 33 Calc. 596.

(3) (1906) I. L. R. 34 Calc. 109; 5 C. L. J. 33.

(4) (1910) 13 C. L. J. 109.

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title to the Chowkidari chakran lands which were never put up to sale for realization of the arrears due from the remainder of the estate. We hold accordingly that the decree made by the Subordinate Judge is correct but not on the grounds set out in his judgment.

The result is that this appeal is dismissed with costs.

A. T. M.

Appeal dismissed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
Walmsley.*

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May, 22.

KHONDKAR MEHTI HOSSEIN AND OTHERS

v.

UMES CHANDRA MOOKERJEE AND ANOTHER.*

*Chowkidari Chakran land—Resumption—Settlement by Zemindar^c with tenants—
Rent payable by Putnidar—Damages—Basis of calculation.*

If, in assessing the putni rent, the profits of all the lands including the Chowkidari chakran lands were fully taken into account, the putnidar will not be liable to pay additional rent for the chakran lands, when they come into his possession; but otherwise the putnidar is bound to pay to the zamindar, in addition to the first amount assessed on resumption, a fair share of the profits derivable from the land.

Kazi Newas Khoda v. Ram Jadu (1) referred to.

The damages payable by the zamindar to the putnidar in case of dispossession by the former is measured by rent payable by actual cultivators to the putnidar.

Appeal by the Defendants.

Suit for recovery of possession of land with mesne profits.

The material facts are stated in the judgment.

Babus Ram Chunder Mozumdar and Nagendra Nath Sen for the Appellants.

Babu Brojendra Nath Chatterjee for the Respondents.

* Appeals from Appellate Decrees Nos. 2402, 2501 and 2502, of 1912, against the decision of Babu Asutosh Sarkar, Subordinate Judge of Birbhum, dated the 6th May, 1912, modifying that of Babu Girindra Nath Mookerjee, Munsiff, of Rampurhat, dated the 25th March, 1911.

(1) (1906) I. L. R. 34 Calc 109; 5 C. L. J. 33.

The judgment of the Court was delivered by

Mookerjee, J.—(S. A. 2402 of 1912). This is an appeal by the defendants in a suit for recovery of possession of land with mesne profits. On the 27th July, 1866, the plaintiffs obtained a putni of two villages from the zemindar defendants. A bonus of Rs. 1,000 was paid for this lease and the annual rent was fixed in perpetuity at Rs. 501. Within the ambit of the lands comprised in the putni lease, there were Chowkidari chakran lands at that time in the occupation of Chowkidars. These lands were subsequently resumed by the Government and transferred to the zemindars in conformity with the provisions of the Village Chowkidari Act, 1870. The zemindar took possession of the lands and settled them with tenants. The plaintiffs, who were putnidars, thereupon, instituted this suit on the 11th June, 1910 for declaration of their titles and for recovery of possession with mesne profits. The Courts below concurrently made a decree in their favour; but the two Courts have disagreed as to the terms under which the plaintiffs are entitled to hold this land as part and parcel of their putni under the zemindars. The Court of first instance held that the plaintiffs were under an obligation to pay to the zemindars, not only the sum assessed under the Village Chowkidari Act, 1870 at the time of resumption, but also a share of the profits of the lands they claim to recover. On appeal, the Subordinate Judge has held that the plaintiffs are liable to pay to the zemindars nothing beyond the sum assessed at the time of resumption as payable into the Chowkidari fund. Upon the question of mesne profits also, the two Courts have disagreed. The trial Court held that the rent payable by the tenants settled on the lands by the zemindars was the measure of damages recoverable by the plaintiffs. The Subordinate Judge, on the other hand has held that the plaintiffs are entitled to the value of the actual produce of the lands in suit. The zemindars have appealed to this Court and have raised only those two questions whereon the Courts below have disagreed; they have not disputed the right of the plaintiffs to recover possession of the lands; and it may be added that in view of the decision of the Judicial Committee in the case of *Raja Ranjit Singh v. Sri-mati Kali Dasi Debi* (1), the decree for possession cannot possibly be successfully challenged.

As regards the first question, namely, the terms under which the plaintiffs are entitled to recover possession of these lands from the zemindars and the tenants inducted by them into the land, we are

(1) (1917) 25 C. L. J. 499 P. C.

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of opinion that the view taken by the Subordinate Judge is erroneous. It was pointed out by this Court in the case of *Kasi Newas Khuda v. Ram Jadu Dey* (1), that if in assessing the putni rent, the profits of all the lands including the Chakran lands were fully taken into account, the putnidar would not be liable to pay additional rent for the Chakran lands when they came into his possession; but otherwise the putnidar is bound to pay to the zemindar, in addition to the fresh amount assessed on resumption, a fair share of the profits derivable from the land. This view has been subsequently approved in the cases of *Rajendra Nath Mukherjee v. Hira Lal Mukherjee* (2), *Gopendra Chandra Mitter v. Tara Prasanna Mukherjee* (3) and *Hareck Chand Babu v. Charu Chandra Sinha* (4). In the first of these cases Brett J. pointed out that it was not correct to hold as a general principle of law that the putnidar is not bound to pay to the zemindar more than the assessment made by the Collector; the zemindar would be equitably entitled not only to payment of the assessment made by the Collector, but also a proportionate share in the profits such as the zemindar would, in the circumstances, be entitled to impose on the putnidar. We are of opinion that this view is unquestionably sound on principle. In the case before us there is no indication in the contract between the parties that, at the time of inception of the grant, the putni rent was assessed on the basis of the assets of all the lands situated within the ambit of the putni inclusive of the Chowkidari Chakran lands. It is on the other hand plain that the rent hitherto paid by the plaintiffs to the defendants has not represented the profits derivable from the Chowkidari Chakran lands. Consequently, the terms of the contract between the parties do not entitle the plaintiffs to claim possession of the lands in suit from the zemindars, merely on payment of the sum now assessed by the revenue authorities under the Village Chowkidari Act, 1870.

Reliance has been placed by the plaintiffs respondents upon the provisions of section 51 of the Village Chowkidari Act, which, however, do not really advance their contention. Section 51 provides that the land resumed by the Collector is transferred to the zemindar, subject to the prior contracts made by him. The effect of the application of that principle to the case before us is that the plaintiffs can under the terms of the putni lease, recover

(1) (1906) I. L. R. 34 Cal. 109; 5 C. L. J. 33; 11 C. W. N. 201.

(2) (1906) 14 C. W. N. 995.

(3) (1910) 14 C. W. N. 1049.

(4) (1910) 13 C. L. J. 102; 15 C. W. N. 5.

possession of the lands in suit. But the contract does not show that the plaintiffs are entitled to such possession without payment of any rent to the zemindar or without payment of any sum beyond what represents the new assessment. Consequently, on equitable grounds, the putnidar and the zemindar must be placed in the position they would have occupied if the Chowkidari Chakran lands had been resumed before the putni was created; the assets of those lands would then have been taken into account in settling the amount of putni rent, which would have represented the assessment due to the state as also a fair share of the profits. In these circumstances we are of opinion that the order of the Court of first instance was just and proper and should not have been varied by the Subordinate Judge.

As regards the second question, namely, the basis of calculation of *mesne profits*, it cannot be disputed that the plaintiffs as putnidars would have been entitled to possession of the lands through tenants; the measure of damages payable to them is consequently represented by the rent payable by the actual cultivators to the plaintiffs as putnidars. This was the view taken by the Court of first instance, and should not have been rejected by the lower Appellate Court.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. The appellants are entitled to the costs in this Court but there will be no order for costs before the Subordinate Judge.

This judgment will govern the other two cases, *viz.*, S. A. 2501 and 2502 of 1912, in each of which a similar order will be drawn up.

A. T. M.

Appeals allowed.

*Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice
W almsley*

BEHARI LAL GHOSE AND OTHERS

v.

SINDHUBALA DASL.*

Occupancy holding, non-transferable—Gift, if valid—Gift, when revocable.

* Appeal from Appellate Decree No. 1916 of 1915, against the decision of J. E. Phillimore, Esq., District Judge of Birbhum, dated the 3rd May, 1915, affirming that of Babu Khetra Nath Banerjee, Munsiff of Bolepur, dated the 17th March, 1914.

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The decision of the Full Bench in the case of *Dayamayi v. Ananda* (1), is an authority for the proposition that in case of transfer for value, the title passes from the transferor to the transferee, although the validity of the transfer is liable to be questioned by the landlord, who is not a party to the transaction. The principle is also applicable to the case of a transfer by gift. *Amulya Ratan v. Tarini* (2) distinguished

A gift may be revoked, as a contract may be cancelled, on the ground of fraud mistake, coercion, undue influence, misrepresentation or like reason

Appeal by the Defendants.

Suit for recovery of possession of land on declaration of title.

The material facts are stated in the judgment.

Babu Brojendra Nath Chatterjee for the Appellants.

Babu Bhupendra Nath Ghose for the Respondent.

The judgment of the Court was delivered by

May, 4.

Mookerjee, J—This is an appeal by the defendants in a suit instituted by the respondent for recovery of possession of land upon declaration of title. The land in dispute constituted the occupancy holding of one Nader Chand Ghose who died in 1890. Shortly before his death, he executed, on the 18th March 1890, a deed of gift in favour of his widowed daughter Suchand Mukhi Dasi whereby he professed to transfer the property to her. The document was duly attested and was registered as required by the provisions of the Transfer of Property Act. The donee continued in occupation till her death in 1898, when the present plaintiff, her daughter came into possession under claim of title by inheritance. In 1910, the defendants forcibly took possession of the land on the allegation that after the death of Nader Chand Ghose, the land had passed to his widow, and, upon her death, had vested in them as the reversionary heirs (nephews) of the last full owner. On the 29th March 1913, the plaintiff instituted this suit for declaration of her title and for recovery of possession with mesne profits. The defendants denied that the deed was executed by Nader Chand Ghose and contended that the claim was barred by limitation. The court of first instance found that the claim was not barred by limitation and that the plaintiff had acquired a valid title to the property as the heiress of her mother who had obtained the land from her father under the deed of gift already mentioned. An objection was taken before the trial court that as the land constituted a non-transferable occupancy holding, the deed of gift was inoperative in law and that consequently the plaintiff had not acquired a valid title. The court

(1) (1914) I. L. R. 42 Cal. 172; 20 C. L. J. 52.

(2) (1914) I. L. R. 42 Calc. 254; 21 C. L. J. 187.

held that this question could be raised only by the landlord or his representative in interest, and accordingly decreed the suit. Upon appeal the District Judge has confirmed the decree of the court of first instance. On the present appeal, the defendants have argued that no valid gift could be effected in respect of a non-transferable holding, that notwithstanding the execution and registration of the deed of gift the property continued to form part of the estate of the donor, passing, upon his death, to his widow, and, vesting, upon her death, in the defendants as the reversionary heirs to the last full owner. The decision of the Full Bench in the case of *Dayamayi v. Ananda Mohan Roy* (1), has been distinguished by the appellants on the ground that the principles enunciated therein are expressly limited in their application to cases of transfer of occupancy holdings for value. On the other hand, the respondents have referred to the decision in *Rahim Jan Bibi v. Iman Jan* (2), which is an authority for the proposition that in circumstances closely analogous to those of the case before us, the question of transferability can not be raised by the heir of the donor to the prejudice of the donee or his representative in interest. In our opinion the view taken by the courts below is well-founded on principle, and must be upheld.

The decision of the Full Bench in the case of *Dayamayi v. Ananda Mohan Roy* (1), is an authority for the proposition that in cases of transfers for value, the title passes from the transferor to the transferee, although the validity of the transfer is liable to be questioned by the landlord who is not a party to the transaction. Let us consider whether this principle is applicable to cases of gifts of non-transferable occupancy holdings. Section 122 of the Transfer of Property Act defines a gift as the transfer of certain existing movable or immovable property, made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Section 123 defines the mode in which the transfer is to be effected; in the case of immovable property, the transfer must be effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. Section 126 deals with the question of revocation of gifts. The first paragraph of the section provides that the donor and the donee may agree that on the happening of any specified event, which does not depend on the will of the donor, a

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(1) (1914) I. L. R. 42 Cal. 172 ; 20 C. L. J. 52 ; 18 C. W. N. 971.

(2) (1911) 17 C. L. J. 173.

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Mookerjee, J.

gift shall be suspended or revoked; but a gift, which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part as the case may be. The second paragraph lays down that a gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Then follows the important provision, in the third paragraph, that "save as aforesaid, a gift shall not be revoked." This provision is a legislative recognition of a doctrine enunciated more than two centuries ago by Lord Nottingham in the case of *Villers v. Beaumont* (1). "If a man will improvidently bind himself up by a voluntary deed and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you would relieve in such a case, you must consequently establish this proposition, namely, that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd." The position, consequently, is clear, that, except in the circumstances mentioned in section 126 of the Transfer of Property Act, a gift cannot be revoked. The second paragraph of the section shows that a gift may be revoked as if it were a contract but not on the ground of want or failure of consideration; in other words, a gift may be revoked, as a contract may be cancelled, on the ground of fraud, mistake, coercion, undue influence, misrepresentation or like reason. No such reason is assigned in the present case. But it is argued that the donor was competent to revoke the gift immediately after execution and registration of the document on the ground that the property transferred by way of gift constituted a nontransferable occupancy holding and that such right of revocation has vested in his heir. To test the validity of this argument, we have to consider whether the transaction could have been rescinded if it had been a contract. The section makes it plain that such rescission was not permissible. The substance of the matter is that although in contracts for sale, mortgage, lease or exchange there is pecuniary consideration, and, in a gift there is no such consideration, the right of rescission is circumscribed by the same set of circumstances. Now the decision of the Full Bench in *Dayamayi v. Ananda Mohan Roy* (2), shows that this transaction could not have been rescinded if it had been for valuable consideration. The inference follows that it cannot be rescinded merely by reason of want or failure of such consideration.

(1) (1682) 1 Ver. 101.

(2) (1914) I. L. R. 42 Calc 172; 20 C. L. J 52.

Reliance has been placed on behalf of the appellant upon the decision in *Milroy v. Lord* (1). That case, however, is clearly distinguishable. There the property transferred constituted 50 bank shares which were transferable only by entry in the books of the Company; no such transfer was ever made, but a deed poll was executed. In these circumstances, Turner, L. J. observed as follows: "In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him" These remarks are followed by Jessel, M. R. in *Richards v. Delbridge* (2), where he observed that a man may transfer his property, without valuable consideration if he does such acts as amount in law to a conveyance or assignment of the property and thus completely divest himself of the legal ownership which vests in the person who by those acts acquires the property. Consequently, to make the principle of *Milroy v. Lord* (1), applicable here, the appellant would have to establish that the nature of the property transferred in this case was such that no valid transfer thereof could be effected till the consent of the landlord had been obtained and the name of the transferee registered in his books. But, the decision of the Full Bench shows abundantly that in cases of transfers for value, title unquestionably passes from the transferor to the transferee, even though there is no recognition by the landlord; in other words, a transfer of this description cannot be impeached by the transferor, though the landlord may possibly refuse to recognise the transfer. In our opinion, the principle of the decision in *Milroy v. Lord* (1), has no circumstances of the present case. Reliance has finally been placed upon the decision in *Amulya Ratan v. Tarini Nath* (3), which is an authority for the proposition that the holder of a non-transferable occupancy holding is not competent to make a testamentary bequest of such holding. That case is clearly distinguishable, founded as it is on the fact that that the bequest was revocable up to the last moment of the life of the testator and that the very moment that the bequest would come into operation, if legal and valid, was the moment when the right of the heir would accrue by operation of law. In the case before us, the gift was not revocable, and was binding as between the donor and the donee.

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(1) (1862) 4 DeG. F. & J. 264.

(2) (1874) L. R. 18 Eq. 11.

(3) (1914) I. L. R. 42 Calc. 254; 21 C. L. J. 187; 18 C. W. N. 1290.

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It cannot consequently be maintained that notwithstanding the execution and registration of the deed of gift, the property continued to form part of the estate of the donor. The property ceased to be part of the estate of the donor, and there is thus no escape from the position that the heir did not succeed to it by right of inheritance.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

*Before Mr. Justice Fletcher and Sir Syed Shamsul Huda, Knight,
 Judge.*

NEAMATANNESSA BIBI

v.

GOLAM PANCHATON KAZI AND OTHERS.*

CIVIL
 1918.
 January, 28.

Gift—Mahomedan Law—Invalid condition.

The ordinary rules applicable to gifts apply to the Mahomedan law like any other system of law and one of these rules is that a gift is not invalidated by an invalid condition being attached to it.

Appeal by the plaintiff.

Suit for Partition.

The material facts and arguments appear from the judgment.

Babu Narendra Nath Chowdhury for the Appellant.

Mr. Ashrufali Chowdhury, Babus Bhabataran Brahmachari and Sisir Kumar Ghoshal for the Respondents.

The judgments of the Court were as follows:

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned additional Subordinate Judge of Howrah dated the 24th May, 1915. The plaintiff is a Mahomedan lady. She brought the suit claiming partition of a 2-anna share in the property which she said she was entitled to. The parties are relations. The plaintiff claimed her title under a document called a Heba-bil-ewaz; that is, a gift for consideration. The document bore date the 26th Bysakh 1303. It was executed by her late

* Appeal from Original Decree No. 374 of 1915, against the decision of Babu Sarat Chandra Basu, Additional Subordinate Judge of Howrah, dated the 24th May, 1915.

January, 28.

father-in-law Suja-uddin Nazir who also registered it. There is no doubt about the execution and the registration of the document. The reason why the document was given is stated to be this: The plaintiff married in Bysakh 1302 the defendant No. 1 who was the only son of Suja-uddin. The dower was stipulated, according to the Mahomedan marriage register, to be a sum of Rs. 10,000—Rs. 5,000 being prompt and Rs. 5,000 deferred. Only a sum of Rs. 500 was paid at the time of the marriage and it appears from the register that it was the intention all along that the dower payable to the plaintiff was to be secured in a proper manner. So, about one year after the marriage, Sujauddin executed this Heba-bil-ewaz. At that time Sujauddin was entitled to a 3 anna 15 gunda odd share in Towji No. 95 of the Hughly Collectorate. By the deed, in satisfaction of Rs. 800 a portion of the dower, he made over to the plaintiff a two-anna share out of the 3 anna 15 gunda share to which he was entitled. Sujauddin subsequently on the death of his sister inherited another two annas. Immediately following the deed what was done does not appear clear from the evidence; but it is not suggested in this case that the document remained in the possession of Sujauddin. The registered document, so far as appears from the evidence, presumably was made over to the plaintiff. There is a lot of evidence in this case as to whether the plaintiff was actually in receipt of a definite portion of the rent or whether Sujauddin was actually receiving it. These parties were all living in the same house—living presumably on the income of the property and it would be unusual in a case of that nature for the daughter-in-law to receive from the hands of the father-in-law this income of the property that had been given to her in lieu of a portion of the dower, and then to have to pay a portion of it towards the family expenses. But what is important is that on the 4th June 1908, when Sujauddin was alive the plaintiff applied for and obtained registration of her name in the Collectorate in respect of this two-anna share claiming it under the deed of Heba-bil-ewaj already mentioned. That seems to me to be an important transaction that had taken place. It was a definite recognition of the gift both by the collectorate and by Sujauddin. Then, we come to an earlier suit. The present defendant No. 12 brought a partition suit in which Sujauddin was impleaded as a defendant. He set up the plea that the suit was defective for want of parties on the ground that he had given to his daughter-in-law, the present plaintiff, two annas out of his share in satisfaction of a portion of her dower. There was a compromise in that suit and the terms of the com-

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promise provided, although the present plaintiff was not a party to that compromise, that two annas out of Sujauddin's share should belong to the present plaintiff. It is quite true that subsequently that compromise was set aside on the ground that three Purdah-nashin ladies were not bound by the terms thereof^o; but still the clear admission made by Sujauddin recognizing the Heba-bil-ewaz cannot be got rid of. The learned Judge's view that because at the instance of these three Purdah-nashin ladies who claimed under totally different rights the compromise was set aside, therefore, the admission of Sujauddin in the written statement and the solenama could have no evidentiary value for and against any body in the world is obviously inaccurate. Then followed the death of Sujauddin. Sujauddin's family consisted of besides the defendant No. 1 his only son, five daughters. Four of these daughters are defendants in the present case and the defendants Nos. 2 to 8 are the children of the remaining daughter who is dead. The case obviously is one in which these daughters and the children of the dead daughter may no doubt feel a certain amount of disappointment on the ground that Sujauddin seems to have treated his only son's wife on a more liberal basis than if he had permitted his property to devolve according to the ordinary rules of succession under the Mahomedan law. But a person may from a deep attachment for his only son and he may wish to benefit that son and may give him a larger share in the property than what the son would inherit, and that is no reason why a deed like this duly executed, and duly registered should not be given due effect to. The learned Judge seems to have been misled by an inaccurate reading of the decision of this Court in the case of *Rahim Jan Bibi v. Iman Jan* (1). That case does not establish the proposition that the learned Subordinate Judge says it does. That case is a very different case because there the Heba-bil-ewaj was never parted with by the donor. Of course, in those circumstances where the document was retained by the donor without any evidence that he ever intended to benefit the donee, there was no gift nor was there any possession either actual or constructive. That was a case where the evidence established clearly that the deed was not acted on. The deed in the present case was no doubt fully acted upon.

Then a point was made on the form of the gift. That turns on the words in the deed as to the nature of the enjoyment which the donee was entitled to have. The terms of the gift are clearly unqualified because the words are that the donor gives up the entire

(1) (1911) 17 C. L. J. 173.

right, title and interest in the two annas and vests the same in the donee by executing the Heba-bil-ewaz. The donor Sujauddin then describes the mode of enjoyment of the gift and he says "by getting your name registered and by paying the revenue to the Collectorate you with your sons born of your womb out of the loins of my said son and grandsons etc., in succession shall continue to hold and enjoy the same." It is said that that condition in the gift restricts the former part of the document and, therefore, so controls it that it is a gift of a limited interest not recognized by the Mahomedan Law. But the ordinary rules applicable to gifts apply to the Mahomedan law like any other system of law and one of these rules is that a gift is not invalidated by an invalid condition being attached to it. That system has been recognized apparently by the Mahomedan jurists from the earliest period as cited in Baillie's digest of Mahomedan law, second edition page 546. If those conditions as to the form of enjoyment cannot control the form of the gift, it is absolute and unqualified. I think that in this case the learned Judge's finding that this document has not been acted on and was intended to defraud the daughters of a living Mahomedan who had a right to dispose of his property in any manner he thought fit cannot be supported. It may be a misfortune to these ladies that their father's affection for his only son was so great that he treated him and his wife on so generous terms that they reduced the share which they would have got by inheritance. But that does not make the document an invalid one. I think that effect must be given to this document properly executed by the deceased Sujauddin and properly registered and subsequently acted on by registration in the collectorate and by other acts which leave no doubt in my mind that it was intended by the deceased Sujauddin to pass this property from himself to his daughter-in-law the plaintiff in the present suit. The present appeal must, therefore, be allowed and the judgment of the learned Judge set aside and in lieu thereof there will be a declaration that the plaintiff is entitled to a two anna share in the property under and by virtue of the Heba-bil-ewaz referred to in the plaint and the case must be remitted to the Court of first instance to effect the partition of the plaintiff's share in accordance with that declaration. The costs of this appeal will be borne by the respondents. We assess the hearing-fee at three gold mohurs. The costs of the Court of first instance will be dealt with by the learned Judge at the time he makes the partition.

Shamsul-Huda, J.—I agree.

A. T. M.

Appeal allowed; Case remanded.

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Before Mr. Justice Richardson and Mr. Justice Beachcroft.

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February, 5, 6,
March, 5.

SACHI PRASAD MUKHERJEE

v.

AMAR NATH RAI CHOUDHURY AND OTHERS.*

Prohibitory injunction, decree for—Mode of enforcing the decree—Separate suit, if lies—Civil Procedure Code (Act V of 1908) Or. XXI, r. 35 Cls. (1) and (5)—“Act required to be done,” meaning of.

A suit is not maintainable for enforcement of a prohibitory injunction embodied in a decree, but the remedy lies by way of execution under order XXI, rule 32 of the Code of Civil Procedure.

Venkata Chellam Chetty v. Veerappa Pillai (1) and *Jamsetji Manekji Kotwal v. Hari Dayal* (2) followed.

Per Richardson, J.—Order XXI, rule 32 cl. (5) of the Code applies both to mandatory as well as to prohibitory injunctions.

The expression “the act required to be done” means what has to be done to enforce the injunction

Appeal by the Defendant.

Plaintiffs brought a suit for demolition of a wall, raised by the defendant, so far as it was above the height limited by a permanent injunction embodied in a decree in a former suit between the parties, and for removal of a cookshed interfering with the plaintiff's ancient lights, and also for recovery of possession of a narrow strip of land between the premises of the plaintiffs and the defendant, on which the defendants had encroached and built a privy.

Babu Bepin Behary Ghose (with him *Babu Kshitish Chandra Chakravarti*) for the Appellant: Refers to Order XXI, r. 32 of the Civil Procedure Code. Rule 32 cl. (5), is a new provision. It supplies a gap in the Code of 1882. Refers to *Durga Das Nandi v. Dewraj Agarwala* (3). Clause (1) of rule 32 applies to injunctions both mandatory and prohibitory. In the present Code the words “for an injunction” take the place in the old Code of the words “for the performance or abstention from any other particular act.” The expression “the act required to be done” means what has to be done to enforce the injunction. The plaintiffs should not have

* Appeal from Appellate Decree, No. 1214 of 1915, against the decree of Babu Upendra Chandra Mukherjee, Subordinate Judge, 2nd Court, of Hooghly dated the 14th April, 1915, reversing that of Babu Nara Nath Mukherjee, Munsiff, Additional Court, at Serampur, dated the 18th August, 1913.

(1) (1905) I. L. R. 29 Mad. 314.

(2) (1907) I. L. R. 32 Bom. 181.

(3) (1905) I. L. R. 33 Calc. 306.

brought a fresh suit but should have applied for execution of the decree passed in the previous suit under order XXI, rule 32 cl. (1) or cl. (5). Refers to *Venkata Challam Chetty v. Veerappa Pillai* (1). As the suit has not been brought within 3 years from the breach, complained of, plaintiff's remedy is barred by article 181 of the 1st Schedule of the Limitation Act.

As to the cookshed the decree in the former suit does not affect it.

As to the privy, the suit is in essence a suit for ejectment, and it is barred by Art. 142 of the Limitation Act.

Babus Jogesh Chandara Roy (with him *Babus Surendra Nath Roy* and *Satyendra Nath Roy*) for the Respondents. The title to the land in question has been found in my favour. As to the privy, the plaintiffs were not aware of its existence. Refers to evidence, and to the cases of *Framji Cursetji v. Goculdas Madhowji* (2), and *Chokkalinga Naicken v. Muthusami Naicken* (3).

With regard to injunction, it is a continuing wrong. Refers to section 23 of the Limitation Act. Plaintiffs are entitled under section 47 cl. (2) Civil Procedure Code to ask that the plaint may be treated as an application for execution; and if Art. 181 applies, it is governed by section 23 of the Act. Relies on *Jalandhar Thakur v. Jharula Das* (4) *Rajrup Koer v. Abdul Hossein* (5), *Ram Saran v. Chatar Singh* (6), and *Bhagwan Das v. Sukhdei* (7). Distinguishes *Venkata Chellam Chetty v. Veerappa Pillai* (1). A suit for injunction can be brought under the present circumstances: See *Sakaral Joswantrai v. Bai Parvatibai* (8) and *Jamsetji Manekji Kotwal v. Hari Dayal* (9).

Babu Kshitish Chandra Chakravarti in reply.

C. A. V.

The following judgments were delivered:

Richardson, J.—In this suit the plaintiffs complain:—

(1) that the defendant by raising the north wall of his house has disobeyed a permanent injunction embodied in a decree between the parties, dated September 1895;

(2) that the defendant by building a cook-shed has interfered with the plaintiffs' ancient lights;

(3) that the defendant has encroached on a narrow strip of land between the two premises, which belongs to them, by building a privy on the eastern end of it.

(1) (1905) I. L. R. 29 Mad. 314

(3) (1897) I. L. R. 21 Mad. 53

(5) (1880) I. L. R. 6 Cal. 394.

(7) (1905) I. L. R. 23 All. 300.

(9) (1907) I. L. R. 33 Bom. 131.

(2) (1832) I. L. R. 16 Bom. 333.

(4) (1914) I. L. R. 42 Cal. 244.

(6) (1901) I. L. R. 23 All. 465

(8) (1901) I. L. R. 26 Bom. 283.

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As to (1) the plaintiffs ask for the demolition of the wall so far as it is above the height limited by the permanent injunction. The defence made is that the plaintiffs should not have brought a fresh suit but should have applied for the execution of the decree of 1895 under order XXI, Rule 32 clause (1), or clause (5), and that an application for execution at the date of the suit would have been barred by limitation under article 181 of the schedule of the Limitation Act of 1908, corresponding with article 178 of schedule II of the Limitation Act of 1877.

The learned Munsiff in the trial Court upheld this plea relying upon the decision of the Madras High Court in *Venkata Challam Chetty v. Veerappa Pillai* (1) which is clearly in point. In the lower appellate Court, the learned Subordinate Judge has taken a different view. He is of opinion that clause (5) of rule 32 only applies to a mandatory injunction as distinguished from a prohibitory injunction, such as we have here, that the plaintiffs are entitled to enforce the injunction by suit, that the wrong done by disobeying the injunction is a continuing wrong within the meaning of section 23 of the Limitation Act, and that the suit is within time. He has therefore made a decree awarding the relief claimed and the defendant has appealed.

I agree, in the result, with the Munsiff. Clause (5) of rule 32 is a new provision. It supplies a gap in the code of 1882 to which attention was drawn by the cases of *Sakarlal Jaswantraï v. Bai Parvati-bai* (2); *Durga Das Nandi v. Devraj Agarwala* (3). These cases and others illustrate the practice, and the practice is in accordance with the Code. Rule 32 gives a remedy by execution and the enforcement of an injunction being a question relating to the execution, discharge or satisfaction of the decree by which it is awarded, a separate suit is prohibited by section 47 [Cf. *Jamsetji Manekji Kotval v. Hari Doyal* (4)].

Clause (1) of rule 32 clearly applies to injunctions both mandatory and prohibitory. In the present Code the words "for an injunction" take the place in the old Code of the words "for the performance or abstention from any other particular Act." I can see no reason why clause (5) should be limited to mandatory injunctions. The clause gives a discretionary power to the Court to direct that "the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court at

(1) (1905) I. L. R. 29 Mad. 314.

(2) (1901) I. L. R. 26 Bom. 283.

(3) (1905) I. L. R. 33 Calc. 306.

(4) (1907) I. L. R. 32 Bom. 181.

the cost of the decree-holder." The expression "the act required to be done" means what has to be done to enforce the injunction. In the present case it is the part demolition of the defendant's wall. In my opinion on an application for execution of the decree of 1895, the Court might have proceeded either under clause (1) or clause (5).

The question of limitation, if it were necessary to decide it, is perhaps more difficult. It is contended for the plaintiffs that if the suit in respect of this wall is not competent, they are entitled under clause (2) of section 47 of the Code to ask that the suit may be treated as an application, that if Article 181 applies that Article is governed by section 23 and that on this footing the suit or application is in time.

The answer seems to be that assuming that a suit upon a decree which has never been carried into the execution department at all, can be treated under clause (2) as an application to execute that decree, nevertheless the power given by the clause is a discretionary power and the present case is not one in which it ought to be exercised. The flaw in the plaintiffs' procedure was pointed out by the Munsiff but nothing has since been done to put the case on a proper footing. If the concession were allowed the plaint would have to be regarded as partly a plaint and partly an application for execution. The plaintiffs, moreover, appear to have been very dilatory in asserting their rights.

It may be well, however, to add as to Article 181, that the view of the Madras High Court that under that Article, an application to enforce an injunction must be made within three years of the particular breach or disobedience which is the occasion for the application, differs somewhat from the view taken by the Allahabad High Court. In *Ram Saran v. Chatar Singh* (1), the learned Judge observe that disobedience of an injunction is a contempt of Court. They hold that an application to enforce the injunction is not governed by Article 179 (now Article 182) and apparently that no period of limitation is prescribed, but made no reference to Article 178 (now Article 181). This case was followed in *Bhagwan Das v. Shukhdei* (2). Both Courts, it will be observed, agree that the terms of Article 182 put it out of the question. For the present purpose the subject need not be further discussed.

In my opinion, in regard to the wall of the house, the decree of the Subordinate Judge should be discharged and the decree of the Munsiff restored.

(2) As to the cook-shed, it was conceded in the argument before

(1) (1901) I. L. R. 23 All. 465.

(2) (1905) I. L. R. 28 All. 300.

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us that the decree of 1895 does not affect it. The cookshed appears to be a new building and its north wall is to the south of the line of the north wall of the house produced westwards. The Subordinate Judge is clearly wrong in treating the cookshed as if the permanent injunction applied to it. That, however, is how the claim is put in the plaint. Obviously on that footing the suit must fail, apart from the admission in the plaint that the cookshed has been in existence for more than four years, an admission which, as the Munsiff observes, would, in any case, preclude the plaintiffs from claiming an easement under section 26 of the Limitation Act.

The plaintiffs' claim in this respect should also, in my opinion, be dismissed.

(3) As to the privy, the suit is in essence a suit in ejectment to which Article 142 of the Limitation Act applies. That is the view of the learned Munsiff and here again I agree with him. The privy has brick walls and was built more than twelve years ago. The observation of the learned Subordinate Judge that the plaintiffs only came to know of its existence within twelve years of the suit is irrelevant. In a case falling under Article 142 they were bound to prove possession within twelve years.

In this Court reference was made for the plaintiffs to *Framji Cursetji v. Goculdas Madhowji* (1), and *Chokkalinga Naicken v. Muthusami Naicken* (2) but the circumstances of the present case are very different. Here we have a masonry structure built on land close to the plaintiffs' house. Possession so taken cannot be whittled away.

The possession, however, of the land on which the privy stands does not entitle the defendant to the remainder of the strip of land between the two houses. As to that remainder the decree of the Subordinate Judge will stand.

The result is that the whole suit must be dismissed save and except so far as it relates to the strip of land. The declaration made by the Subordinate Judge in respect thereto will be affirmed except as regards the land on which the privy stands. The parties will receive and pay costs throughout in proportion to their success and failure.

Beachcroft, J.—I agree in making the order proposed by my learned brother substantially for the reasons given by him. But I express no opinion whether Order 21, Rule 32 (5) applies to prohibitory as well as to mandatory injunctions.

A. N. R. C.

Decree modified

(1) (1892) L. L. R. 16 Bom. 338.

(2) (1897) I. L. R. 21 Mad. 53.

*Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice
Beachcroft.*

MADHU SUDAN MAHATO AND OTHERS

v.

MIDNAPORE ZEMINDARI CO.*

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August, 1, 2, 8,

14, 23.

Lease—Durputni—Covenant—Under-tenure to be avoided on sale—Bengal Tenancy Act (VIII of 1885), Secs. 159 Proviso, cl. (b), 167, 179—Transfer of Property Act (IV of 1882), Sec. 10.

Section 179 of the Bengal Tenancy Act controls clause (b) of the proviso to section 159.

It is competent for the putnidar and durputnidar to enter into a contract of permanent tenancy, subject to the restriction that subordinate interests carved out by durputnidar will be extinguished on a sale of his under-tenure for arrears of rents. This restriction runs with the land, and is operative not only between the grantor and the grantee, but also between their representatives in interest and holders of derivative titles from them. The condition in the lease is not an absolute restraint on alienation, and is for the benefit of the lessor.

Appeal by the Defendants.

Suit for confirmation of possession of land on declaration of title, or, in the alternative, for assessment of fair and equitable rent thereon.

The material facts are stated in the judgment.

Babu Hirendra Nath Ganguli for the Appellants.

Messrs. C. R. Das, U. N. Sen Gupta, Babus Biraj Mohan Mojumdar and Probodh Kumar Das for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the defendants in a suit for confirmation of possession of land on declaration of title, or, in the alternative, for assessment of fair and equitable rent thereon. The subject matter of the litigation is a large tract of land in mauza Brahmandia in Parganah Sildah. The plaintiffs claim to have acquired proprietary interest as well as several subordinate rights in the village, and their case is that the defendants, though they are their tenants only in respect of the lands comprised in Schedule 'A' to the plaint, have set up an unfounded claim to the other lands of the village, on the basis of a lease granted in their favour by one

August, 23.

* Appeal from Original Decree No. 21 of 1911, against the decision of Babu Pares Chandra Banerjee, Subordinate Judge of Midnapore, dated the 30th September, 1910.

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Madhu Sudan

v.

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Zemindari Co.Mookerjee, J.

Natabar Datta on the 27th July, 1901. The Subordinate Judge has held that this lease was fraudulent, illegal and invalid, and, that, independently thereof, the defendants had no title to the lands of the village other than those included in Schedule 'Aa'. The defendants have appealed to this court against the decree of the Subordinate Judge.

The suit was tried in the court below along with 395 other suits which related to various lands situated in one or other of 165 mouzas included in parganah Sildah. The evidence, oral and documentary, is extremely voluminous, and the paper-book, which has been placed before us, has been prepared apparently on the assumption that an appeal had been preferred to this court in each of the 396 suits. As a matter of fact, the appeal before us relates to only one of these suits, and we are informed that the appeals in the other suits are pending before the District Judge, as the value of the subject matter in each of those cases does not exceed Rs. 5000. The evidence relevant for the determination of the matters substantially in controversy in this appeal, is comprised in a relatively small compass, and the questions at issue are by no means complex or difficult of solution.

The defendants set up a two-fold title to the lands in dispute, namely, first, a title under the lease granted by Natabar Datta on the 27th July, 1901, and secondly, a pre-existing tenancy right, called mandali right, independent of the lease. It will be convenient to investigate separately the validity of the two titles just mentioned.

As regards the title on the basis of the lease of 1901, the material facts are not disputed. In 1901, the sons of one Gangaram Dutt were Darpatnidars of the disputed lands under a lease granted to them on the 6th September 1886 by Chaudhuri Janmejay Mullick, who was himself Patnidar of a half share. Natabar Dutt, one of the sons of Gangaram Dutt, had been appointed common manager of the estate of the Dutt under the provisions of the Bengal Tenancy Act. On the 27th July, 1901, Natabar Dutt, as common manager, granted to the father of the defendants a permanent under-tenure, which, if still operative in law, entitles them to possession of the lands in suit. The Dutt's defaulted to pay rent regularly to the Mullicks, with the result that on the 21st September 1904, the latter, in execution of a decree for arrears of rent due from the former under the Darputni, purchased the darpatni interest, and the sale was confirmed in due course on the 20th March 1905. The plaintiffs claim under a derivative title from the Mullicks, and their

contention is that the effect of the rent-sale was to extinguish whatever interest the defendants might have acquired under the lease from the Dutts. To test the validity of this contention, we have to examine the terms of the Darpatni lease granted by the Mullicks to the Dutts on the 6th September, 1885. The thirteenth paragraph of the Darpatni kabuliati executed by the Dutts in favour of the Mullicks was in these terms:

"Like yourself, we shall have full rights to grant leases or make settlements of lands in the Muffassil; but if these Darpatni mehals be sold at auction for arrears of malikana (rent) due to you, then all agreements entered into by us shall be extinct (stand annulled)."

There is really no room for controversy as to the exact meaning of this provision in the lease. The parties clearly intended that the Darpatnidar should have full rights to grant leases or create incumbrances, subject only to the restriction that if the Darpatni was sold for arrears of rent, the subordinate titles created by the Darpatnidar should at the same time come to an end. The defendants have consequently been constrained to argue that the stipulation was void in law, because it contravened the provisions of section 159 of the Bengal Tenancy Act and section 10 of the Transfer of Property Act. In our opinion, there is no force in this contention.

Section 159 of the Bengal Tenancy Act, no doubt, provides that the purchaser of a tenure, sold in execution of a decree for arrears due in respect thereof, shall take with power to annul incumbrances, and that the power to annul is exercisable only in the manner provided in section 167. But section 179, which is applicable to the case before us, provides that nothing in the Bengal Tenancy Act shall be deemed to prevent a holder of a permanent tenure in a permanently settled area from granting a permanent mokrari lease on any terms agreed on between him and his tenant. It is clear that section 179 controls clause (b) of the proviso to section 159. It was, consequently, competent to the Mullicks and Dutts to enter into a contract of permanent tenancy, subject to the restriction actually imposed, namely, that subordinate interests carved out by the Dutts would be extinguished on a sale of their under-tenure for arrears of rent. This was one of the incidents of the under-tenure created in favour of the Dutts by the Mullicks, and it ran with the land so as to be operative, not merely between the grantors and grantees, but also between their representatives in interest and the holders of derivative titles from them. Section 159 is consequently of no assistance to the defendants.

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Section 10 of the Transfer of Property Act is equally of no avail. That section provides that where property is transferred, subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him. In the first place, there was here no absolute restraint on alienation by the Dutts; the only restriction imposed was that the holder of a derivative title from them would be in peril in the event of a sale of the under-tenure for arrears of rent. In the second place, the transaction was a lease and the condition was obviously for the benefit of the lessor. The under-tenure was the security for the rent charged thereon, and the grantors were competent to impose a restriction of this character to ensure that the property might fetch full value in the event of a sale for arrears of rent. In our opinion, there is no possible escape from the position that the effect of the sale held at the instance of the Mullicks on the 21st September, 1904, for realisation of arrears of rent was to extinguish the subordinate interest created by the Dutts in favour of the predecessor of the defendants.

The next question which requires consideration is, whether the plaintiffs are competent to contend that the legal effect of the rent-sale was to sweep out the Subordinate interest created by the Dutts in favour of the defendants. The possession of the plaintiffs has been assailed by the defendants on the ground that the special title acquired by the Mullicks at the sale for arrears of rent has not legally vested in them. In our opinion, there is no foundation for this contention. On the 17th March, 1906, the plaintiffs obtained a Darpatni lease from the Mulliks in respect of a half share of Parganah Sildah inclusive of the lands in suit. There can be no question that if this lease is valid and operative, the plaintiffs can successfully contend, precisely to the same extent and in the same manner as their grantors, the Mullicks, that the effect of the rent sale was to terminate the interest created in favour of the defendants by the Dutts on the 27th July, 1901. The defendants have, however, argued that the Darpatni granted to the plaintiffs by the Dutts on the 17th March, 1906 was invalid and inoperative, inasmuch as it was granted by a Receiver to the estate of the Mullicks, who, it is alleged, had been appointed by the Subordinate Judge in excess of the authority conferred on him by law. It appears that in 1890 a suit was instituted for the administration of the estate of the Mullicks. On the 5th September, 1890, the Subordinate Judge

made the usual administration decree and appointed a Receiver to that estate. The decree was in conformity with the form prescribed in the Civil Procedure Code of 1882 (Form 130). The Receiver first appointed was subsequently replaced by another gentleman, who, in his turn, was replaced by a third. The contention of the defendants is that the gentleman who was Receiver in 1906 was appointed as such without the sanction of the District Judge, and, that consequently his appointment was *ultra vires*, as under the Civil Procedure Code of 1882 the appointment of a Receiver under section 503 could have been made only with the sanction of the District Judge under section 505. There is no substance in this argument. The Receiver was appointed, not under section 503 of the Code, but by the decree in the administration suit. The administration suit had been instituted for the purpose of satisfaction of the debts due to the creditors of the Mullicks. It was thus incumbent upon the Court to take steps to raise money by sale or lease or any other suitable mode of alienation of the properties comprised in the estate; to effectuate the object in view, the Court, by its decree, appointed a Receiver. The parties to the litigation acquiesced in this decree, and its propriety is unquestionable. The terms of the Darpatni lease were settled by the Court; the premium fixed was paid into Court and applied in discharge of the debts due from the Estate; and the Subordinate Judge himself attested the document granted to the plaintiffs. In our opinion, the Darpatni is valid and unassailable, and the significant fact remains unchallenged that the Mullicks have not only never questioned its propriety, but have actually affirmed it, as is clear from the terms of the conveyance executed by them in favour of the plaintiffs on the 11th January, 1908. We hold accordingly that, at the date of the institution of this suit, the lease granted by the Dutts in favour of the defendants on the 27th July, 1901, was not in operation, and did not furnish an answer to the claim.

As regards the question, whether the defendants have a tenancy right in respect of the disputed lands, independently of the lease granted by the Dutts on the 27th July 1901, it is important to observe that there is no documentary evidence to support the contention of the defendants. There is no initial grant, no confirmatory lease, indeed, no documents whatever which recite even the existence of such a lease. The defendants urge, however, that the rent receipts describe the leasehold property as mouza Brahmandia, which indicates that they were tenants of the entire village, although they used to pay rent in proportion to the cultivated lands

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alone, exclusive of the waste and forest. The rent receipts, in our opinion, do not furnish a reliable guide in this matter, and they do not prove that the defendants had a tenancy right over all the lands in the village. There is also no foundation for the assertion that because the defendants claim a mandali right, such right extends over the whole village; in fact, the extent of the right is in controversy in each of the 396 suits, and it would not be a legitimate method of reasoning to hold, in an individual case, that the extent of the mandali right was as alleged by the defendants, merely because a similar claim had been put forward and was still the subject of controversy in the other pending litigations. In our opinion, the answer to the question, whether the defendants have their alleged tenancy right in the entire village must depend upon the evidence of possession adduced in the case. Tested from this point of view, their case has completely broken down. There are really only three witnesses on the side of the defendants who assert their exclusive possession of the disputed lands, namely, Madhusudan Mahato, Krishna Mahato and Gangadhar Mahato. There is, on the other hand, reliable evidence to show that the plaintiffs have been in possession of considerable tracts of land within the disputed area, where indigo has been grown by them or by their predecessors. Indeed, the defendant Madhusudan Mahato was obliged to concede this in cross-examination. This is plain moreover from the map prepared by the Commissioner on the 12th October 1909 and from the report submitted by him. Besides this, there is evidence to show that the Watsons, the predecessors of the plaintiffs successfully sued the Dutts in respect of indigo grown on large tracts of land in Brahmandia within the disputed area. The evidence makes it clear that the defendants have not been in exclusive occupation of the disputed lands as comprised within their alleged tenancy of the lands of the entire village.

The result is that the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs. Each party, however will pay his own costs of the preparation of the paper book.

A. T. M.

Appeal dismissed.

*Before Mr. Justice Fletcher and Sir Syed Shamsul Huda, Knight,
Judge.*

MATHURADAS KARNANI

v.

SRIKISSEN KARNANI.*

CIVIL.

1917.

December, 13, 14.

Adoption—Maheswari caste of Bikaner—Mitakshara school—Consent.

A widow of a separated brother can adopt of her own motion a son to her deceased husband, a Hindu of a Maheswari caste of Bikaner.

Appeal by Defendant No. 1.

Suit for declaration and consequential relief.

The material facts and arguments appear from the judgment.

Mr. S. N. Banerjee and *Babu Probodh Coomar Das* for the Appellant.

Babu Hira Lal Chuckerbutty for the Respondent.

The judgments of the Court were as follows:

December, 14.

Fletcher, J.—This is an appeal by the defendant No. 1 against the judgment of the learned Subordinate Judge of Darjeeling, dated the 2nd March 1915, decreeing the plaintiff's suit. The plaintiff brought his suit on the allegation that he was the adopted son of a deceased Hindu of the Maheswari caste of Bikaner—the name of the person who had adopted being Amar Chand Karnani and he sought to recover from Mathuradas Karnani and others who were the natural relations of the deceased Amar Chand Karnani a certain property and for consequential relief by way of accounts and discovery. The case set up by the plaintiff was that there was a Hindu of the Maheswari caste called Swairam Karnani. He had three sons—Ketchidas who was the father of Mathuradas, the defendant No. 1; Amar Chand Karnani, the adoptive father of the plaintiff and Jaithrupe who was the husband of the defendant No. 3. The plaintiff alleged that Amar Chand had been adopted by one Gangadas and, therefore, according to the ordinary rules of the Hindu law, Amar Chand ceased on that adoption to be a member of the family of Swairam and passed into the family of Gangadas. That allegation was made distinctly in the pedigree that formed a portion of the plaint and it was not traversed in the written statement nor in the course of the trial. It is, therefore, an admitted fact that Amar

* Appeal from Original Decree No. 386 of 1915, against the decree of F. E. Piffard Esq., Subordinate Judge of Darjeeling, dated the 2nd March, 1915.

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Chand passed out of the family of Swairam and passed into the family of Gangadas. No evidence was offered as to who Gangadas was. There has been a suggestion made in reply that Gangadas was some sort of relation of Swairam and that, therefore, although Amar Chand on his adoption passed out of the family of Swairam, it does not follow that the other sons of Swairam who remained joint with their father ceased to be the reversionary heirs of Amar Chand on his death. That case was not made or suggested in the course of the proceedings and it is much too late in the course of the reply to put forward a case unsupported by any evidence or any statement made in the Court below.

Now, the facts are there—and these facts are not disputed. The three sons of Swairam had built up a business in the district of Darjeeling. Ketchidas, the eldest son, died in 1880 and his only son and heir is the defendant No. 1. Jaithrupe died in 1888 leaving his widow the defendant No. 3. Amar Chand died in 1899 after having been adopted by Gangadas leaving him surviving his widow the defendant No. 2. The business after the death of Amar Chand was carried on by the first defendant. There were some disputes between the defendant No. 1 and the widow of Amar Chand, the defendant No. 2 in the year 1903 and apparently her remittances that she had been accustomed to get from the business in Darjeeling were stopped. She then went to Darjeeling and there the parties arrived at certain agreements which were reduced in writing, the agreements being dated the 21st April, 1903. Under the terms of those agreements, a sum of Rs. 7,500 was deposited with certain Marwari Bankers, the interest being payable to the defendant No. 2 for her maintenance and the capital sum to go to the defendant No. 1 on the death of the defendant No. 2. The documents seem to me to have been quite clearly executed on the footing that the defendant No. 1 would on the death of the defendant No. 2 become entitled to the estate of the deceased Amar Chand Karnani. The agreements do not seem to have put an end to the disputes between the parties and in 1908 the defendant No. 2 is said to have adopted the plaintiff as the adopted son of her deceased husband Amar Chand Karnani.

The main controversy in this case has turned on the question as to whether the evidence establishes the case that the plaintiff was duly adopted. Both parties admitted that the parties were governed by the Mitakshara School of Hindu law. The learned counsel for the defendant-appellant in opening the appeal asserted that the admission meant that the rights of the parties were regulated by the

Benares School of Hindu law. But after consideration of the evidence the learned counsel was bound to admit that the evidence established important variations applicable to the parties which were not in accordance with the opinion held by the Benares School of Hindu law.* It is quite true that he did not admit that the rights of adoption applicable to the parties were different to those laid down by the Benares School of Hindu law; but he was bound to admit that in certain particulars the rights of the parties in this case were shown to be different from those prevailing in the Benares School of Hindu law. It seems to me that that is an important fact because you at once get rid of the suggestion put forward that the admission meant that the parties were governed by the Benares School of Hindu law, *simpliciter* because it is admitted that there were variations from that. The Mitakshara as varied from the Benares School applies in a large portion of India. It applies in Bombay, Western India and Southern India; and in all those different schools of law there are variations of Mitakshara not consistent with the view adopted in the Benares School. It seems to me quite clear in the present case that the admission did not amount to a statement that the rights of the parties as to adoption could be ascertained from the principles held by the Benares School of Hindu law. If you get to that, you have got to look at the evidence. The evidence that has been given in this case as to what is requisite for a valid adoption is not the evidence of learned persons but the evidence of shopkeepers—Marwaris being largely a trading caste. These shopkeepers, it may be said, do not know the principles of the Hindu law; but the evidence shows without doubt that these shopkeepers have undergone the process of adoption—one as many as four times. The evidence also shows that the ceremonies required for a valid adoption by a person belonging to this class are not formal. The evidence is that on the adoption of a boy the guests and relatives receive cocoanuts and sweets and the adopted son has got to have payjamas placed on his head. These seem to be the only ceremonies that are requisite for a valid adoption. The adoption is not also limited, according to the evidence, to the case of children of tender age. There may be an adoption, as in this case, of a person of full age and it does not matter whether that person is married or not. That is the evidence in this case and the learned Judge says that the custom seems to be the same as that obtaining in Bombay or the Western India. It has been suggested that the learned Judge of the Court below stated that the law as applicable in the Presidency of Bombay applied in the state of

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Bikaneer. I do not read the judgment of the learned Judge in the way. I think what he remarks is that the evidence shows that the law as to adoption is the same in Bikaneer as in Western India.

Then, the question was whether the consent of the relatives was necessary. That seems to be the point that was debated not only in the Court below but also in the suit in the Bikaneer Court and the view that was taken was this: That this was not the case of a widow adopting a son to introduce him into the family consisting of the defendants but it was the case of a widow of a separated brother who, although she had no authority from her husband to adopt, had adopted of her own motion the plaintiff. That seems to have been the case put forward. Then the learned Judge came to the conclusion that that case had been established in accordance with the custom prevailing in Bombay and the Western India. The evidence, it is quite true, is not all one way; there are statements made by the witness on both sides. But the learned Judge had the opportunity of seeing the witnesses in the witness box and remarking who were the most intelligent and also the truthful witnesses amongst them and he came to the conclusion that this custom had been satisfactorily established. There does not seem to be any reason to disagree with the conclusion arrived at by the learned Judge of the Court below.

The next question that was raised was as to whether the adoption had or had not been made. That does not seem to have been seriously contested in the Court below. The widow, that is, the defendant No. 2 who adopted the plaintiff states in her deposition that the child was given to her by his natural father and received by her in adoption and there do not seem, according to the evidence, to be any other ceremonies required beyond those observed in this particular case.

Then reference has been made to the proceedings of the Court at Bikaneer and it is said that the adoption cannot have taken place on the date alleged by the plaintiff. I do not read the proceedings of the Court at Bikaneer in the way that the learned counsel for the appellant has attempted to read them. The proceedings originated out of an application by the widow for what is called a *khala*, that is, a certificate of adoption. That is a certificate of the Court at Bikaneer that the widow has, in fact, adopted the plaintiff as a son to her deceased husband, Amar Chand. On that application being made for certificate, the present defendant No. 1, that is, the plaintiff in the Bikaneer Court brought a suit for an injunction to restrain the widow, that is, the adoptive mother of the present

plaintiff from proceeding on the footing of the adoption for the reason that by the deeds of 1903 the widow had precluded herself from making an adoption of any person; and the grounds so far as I can gather from the judgment of the Judges of the Chief Court at Bikaner were these:—That the deeds executed in 1903 operated as a release by the widow of Amar Chand of her interest in the property so as to accelerate the estate of the defendant No. 1 Mathuradas, so that he having taken an absolute interest in the estate of Amar Chand, the widow was incapable of making an adoption so as to defeat him of the rights in the properties he had acquired. The case came on before one of the Munsiffs in the State and he decided one of the issues against the present defendant No. 1. On appeal to the Sudder Nizamut of the State, the Judge of that Court held that the appropriate fee payable to the State on the plaint not having been paid the suit must fail. On appeal to the Chief Court, the learned Judges of that Court disagreeing with the view of the Judge of the Sudder Nizamut held that the plaint was properly stamped but they came to the conclusion that there was nothing in the deeds to prevent the widow of Amar Chand from proceeding to adopt the present plaintiff. That, so far as I gather from the judgment of the Chief Court at Bikaner, was the matter in dispute there. After the determination of that litigation, the *khala*, that is, the certificate of adoption was issued by the State to the widow of Amar Chand. This is the fact, so far as it can be ascertained from the judgments of the Courts at Bikaner.

It is said in this case that the plaintiff asked the Court to set aside the deeds of 1903 on the ground that they had been obtained by fraud and undue influence. The learned Judge of the primary Court came to the conclusion that there was no fraud or undue influence. That seems to be clearly correct because there is no evidence of either fraud or undue influence having been exercised by the defendant No. 1 in obtaining the deeds. Then the learned Judge remarks that the deeds would appear to show that the parties had entered into them on the footing of a common mistake because they had been entered into by the widow of Amar Chand and the present appellant on the footing that the present appellant was the sole reversionary heir to the estate of his natural brother Amar Chand. But the learned Judge says that it is an admitted fact that Amar Chand had passed out of the family on his adoption by Gangadas and that, therefore, the deeds could not be by way of a family arrangement as the appellant before us was not a member of the same family as the

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deceased Amar Chand. He, therefore, came to the conclusion that as against the plaintiff, the adopted son of Amar Chand, the deeds could not be set up as a bar to his rights to Amar Chand's properties that he would acquire on his adoption. That, I think, is right. The evidence in this case, as we have it, shows quite clearly that it is an admitted fact that Amar Chand passed out of the family of which the present appellant is a member into the family of Gangadas. There is nothing on the record to suggest that Gangadas was a close or any relation of Swairam, the grandfather of the appellant, so that on the death of Amar Chand his reversionary heir would be his brother's son Mathuradas, the present defendant No. 1. That is the case that has been suggested in reply; but there is not a word to support such an allegation on the record. It seems to me quite clear in this case that these deeds entered into by the widow only with reference to her maintenance cannot be set up as deeds of family arrangement between the members of the family then in existence bearing the rights of the adopted son—the plaintiff in the present suit. If that is so, the plaintiff is entitled to recover the share of Amar Chand and the learned Judge of the Court below has decreed to the plaintiff a relief in that form. No objection has been raised or urged that the form of the relief that the learned Subordinate Judge has given to the plaintiff is incorrect nor is it suggested that the finding that the learned Judge has arrived at, namely, that the plaintiff is entitled on his adoption to two-third of these properties is wrong. If that is so, I think there are no reasons to come to any conclusion different from that arrived at by the learned Judge of the Court below, namely, that the plaintiff having proved that he was duly adopted by the widow of Amar Chand as a son to her deceased husband is not barred by the deeds of April 1903 from recovering the property of the deceased Amar Chand.

A point has been made in this case that there is a decision reported somewhere in some of the unauthorized reports (1) of the Chief Court in Punjab to the effect that an adoption of this sort amongst Maheswari Hindus is not permitted. The case does not establish anything of the sort. In that case, it was stated that one of the widows in a joint and unseparated Hindu family had attempted to adopt without the consent of the kinsmen a son into the joint family. That is a totally different case from case of a widow of a separated brother adopting of her own motion a son to her deceased husband as in the present case.

(1) *Gopi Kishen v. Gopi Kishen* (1914) 27 I. C. 701.

I think the conclusion arrived at by the learned Subordinate Judge of Darjeeling was correct. The present appeal, therefore, fails and must be dismissed with costs.

Shamsul Huda, J.—I agree.

A. T. M.

Appeal dismissed.

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Before Mr. Justice Richardson and Mr. Justice Walmsley.

GOBINDA CHANDRA GHOSE BISWAS AND OTHERS

v.

NANDA DULAL SUT.*

CIVIL.

1918.

March, 7.

Ejectment, suit for—Licensee, if entitled to a notice to quit.

A licensee in possession of lands is not entitled to a notice to quit.

Doe Ex. d. Knight v. Quigley (1) followed.

Appeal by the Plaintiffs.

Suit for ejectment.

Plaintiffs brought a suit against the defendant for recovery of possession of a certain homestead on the allegation that at the request of the defendant who was a carpenter by profession, they granted him permission to live on the land for 9 or 10 months without any rent and without any right. The defendant built huts on the land, and afterwards refused to vacate the land when asked to do so. They further alleged that although the defendant was not entitled to a notice to quit, still they served on him a notice to quit.

Defendant contended *inter alia* that he was a settled raiyat of the village, that he was let in as a tenant and had acquired occupancy right in the disputed land, and that no notice to quit was served on him.

The lower appellate Court held that although there was no relationship of landlord and tenant, still the defendant, as a licensee in

* Appeal from Appellate Decree, No. 310 of 1916, against the decree of Babu Surendra Nath Ghosh, Subordinate Judge of Tipperah, dated the 23rd September, 1915, reversing that of Babu Surendra Nath Sen, Munsiff of Kashba, dated the 23rd July, 1914.

(1) (1810) 2 Camp. Rep 505.

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possession, was entitled to a notice to quit, and no notice having been served on the defendant, the suit was liable to be dismissed.

Babu Upendra Kumar Roy for appellants contended that the position of the defendant was at best that of a tenant at sufferance, and as such a notice to quit was unnecessary : See *Doc Ex.d. Knight v. Quigley* (1). Even if he was a licensee, no notice was necessary : See *Vythilinga v. Venkatachala* (2). Assuming any notice was necessary, the institution of the suit should be held to be a sufficient notice. Time was allowed by the first Court for the removal of the huts.

Babu Nitish Chandra Lahiri (for *Babu Arun Kumar Ghose*) for the Respondent, submitted that he was inducted into the land under an agreement which subsequently fell through. The plaintiffs allowed him to raise huts, and this raised an expectation that he was to be treated as a tenant. He could not be evicted without a reasonable notice to quit. At any rate he was entitled to compensation.

The following judgments were delivered :

March, 7.

Richardson, J.—This appeal arises out of a suit brought by the plaintiffs for the purpose of ejecting the defendant from certain homestead land in his possession. The case for the plaintiffs was that the defendant was a licensee and was not entitled to any notice to quit. The plaintiffs nevertheless alleged that they had served a notice to quit. The defence raised by the defendant was that he was in possession of the land as the plaintiff's tenant. Both the Courts below have concurred in finding that there is no relationship of landlord and tenant between the parties. Apparently when the defendant obtained possession there was some talk of a lease being granted to him but the negotiations came to nothing. The first Court further found that the notice to quit had been served and decreed the suit allowing the defendants two months' time to remove the huts which he had erected. There is nothing to show that these huts were in any sense of the term permanent structures. In the lower appellate Court the learned Subordinate Judge though, as I have said, he concurred with the Munsiff that the defendant was not a tenant, nevertheless held that he was entitled to a notice to quit and that no notice had been served. In my opinion on the facts found the defendant is a mere licensee and in the words of Lord Ellenborough in *Doc Ex. d. Knight v. Quigley* (1) "if this was a tenure of any sort it was a tenancy at sufferance and a notice to quit was unnecessary." Whether therefore, any notice to quit

(1) (1810) 2 Camp. Rep. 505.

(2) (1892) I. L. R. 16 Mad. 194.

was served or not, I agree with the learned Munsiff that the plaintiffs are entitled to possession of the land. /

In the circumstances I am of opinion that the judgment and decree of the Subordinate Judge should be discharged and the decree of the Munsiff restored with this modification that the time allowed for removing the huts should be extended for a period of two months from the date of the arrival of the record in the trial Court. We make no order as to costs. Let the record be sent down as soon as possible.

Walmsley, J.—I agree.

A. N. R. C.

Appeal allowed.

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Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

SASI MOHAN SAHA AND ANOTHER

v.

KUMUD KUMAR BISWAS AND OTHERS.*

CIVIL.

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June, 16.

Document, impounding of—Document, not basis of suit—Document produced with another document, basis of suit—Stamp Act (I of 1859) Sec. 33.

The petitioners instituted a suit for recovery of money due on a *hatchitta*. The *hatchitta* was in a bound volume which contained a large number of *hatchittas* executed by other persons in favour of the plaintiffs. The entire volume was brought into Court when the plaint was filed. The plaintiffs prayed that the particular *hatchitta*, whereon his claim was founded, should be detached, and placed on the record, and the remainder of the volume should be returned to them. An examination of the *hatchitta*, which was the foundation of the suit disclosed that it was not properly stamped. The Court examined the other *hatchittas* in the volume and came to the conclusion that the other documents were not properly stamped. It accordingly impounded all the *hatchittas* under section 33 of the Stamp Act :

Held, that the Court was incompetent to impound the *hatchittas* on which the claim of the plaintiffs was not founded.

King-Emperor v. Balu (1) distinguished.

* Civil Rule No. 364 of 1916, against an order of Babu Debbrata Mookerjee, Munsiff of Allpur, dated the 14th April, 1916.

(1) (1901) I. L. R. 25 Mad. 525.

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Application for revision by the Plaintiffs.

Suit for recovery of money due on a *hatchitta*.

The material facts are stated in the judgment.

Babus Dwarka Nath Chuckerbutty and *Troylucko Nath Ghose*
for the Petitioners.

Babu Ram Churn Mitra for the Opposite Party.

The judgment of the Court was delivered by

June, 16.

Mookerjee, J.—This Rule calls upon the Secretary of State for India in Council to show cause why an order made under section 33 of the Stamp Act, in circumstances to be presently stated, should not be set aside or modified.

On the 27th March 1916, the petitioners instituted a suit in the Court of the second Munsiff at Alipore for recovery of money due on a *hatchitta*. Under Rule 14 of Order 7 of the Code of Civil Procedure, the plaintiffs were bound to produce the *hatchitta* in Court when the plaint was presented. The *hatchitta* was in a bound volume which contained a large number of *hatchittas* executed by other persons in favour of the plaintiffs. The entire volume was brought into Court when the plaint was filed. The plaintiffs prayed that the particular *hatchitta*, whereon his claim was founded, should be detached, and placed on the record, and the remainder of the volume should be returned to them. An examination of the *hatchitta*, which was the foundation of the suit, disclosed that it was not properly stamped. The Munsiff examined the other *hatchittas* in the volume and came to the conclusion that the other documents were not properly stamped. He accordingly proceeded to impound all the *hatchittas* under section 33 of the Stamp Act. The question in controversy is, whether the Munsiff was competent to impound the *hatchittas* on which the claim of the plaintiffs was not founded.

The first sub-section of section 33 of the Stamp Act provides that every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same. Before action can be taken under this sub-section, it must be established that the instrument in question was produced or came before the officer in the performance of his function. The case for the petitioners is that they did not produce

before the officer any *hatchitta* other than the one upon which their claim was founded. The Munsiff took action at a stage, when there was no material to enable him to question the correctness of this allegation. Consequently, the case is not covered by the first of the two alternatives mentioned in section 33. Nor can we say that the other *hatchittas* came before the Munsiff in the performance of his functions. In the performance of his functions as a judicial officer, the only *hatchitta* which came before him at that stage was the *hatchitta* whereon the claim was founded. We cannot speculate whether, if the trial had proceeded, the plaintiffs might not have possibly relied upon the other *hatchittas* in support of their case. If they had done so, it could well be mentioned that those *hatchittas* were produced before the Munsiff or came before him in the performance of his functions. But that stage was never reached. In our opinion, on the materials before us, it is impossible to say that the Munsiff had jurisdiction to impound the *hatchittas* other than the one which formed the basis of the claim. Reference has been made by the Senior Government Pleader to the case of *King Emperor v Balu Kuppayan* (1), which is clearly distinguishable. There, a search warrant was issued by a Magistrate with a view to the discovery of a register kept by the accused, containing documents not stamped in accordance with the provisions of the Stamp Act. The register was seized in the course of the search and brought into court. It is clear that the register was produced before the magistrate or came before him in the performance of his functions as a Magistrate.

The Rule must consequently be made absolute in part and the order of the court below set aside in respect of all the *hatchittas* other than that which forms the basis of the claim. The pages containing the *hatchitta* in question will be taken out of the volume and kept in the record; the remainder of the volume will be returned to the petitioners

A. T. M.

Rule made absolute in part.

(1) (1901) I. L. R. 25 Mad. 525.

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RAM KINKAR TEWARI AND ANOTHER

v.

STHITI RAM PANJA.*

Execution sale—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—'Dispossession'—Landlord purchaser—Omission to serve notice under O. 21, R. 22 of the Code of Civil Procedure (Act V of 1908), effect of—Process for execution fraudulently suppressed—Civil Procedure Code (Act V of 1908), Sec. 47—Limitation Act (IX of 1908), Sec. 18, Sch. I. Art. 181—Burden of proof.

Where a landlord, in execution of a decree for arrears of rent, puts a holding to sale, purchases it himself and obtains delivery through court, such dispossession of the tenant is not dispossession within the meaning of article 3, Schedule III of the Bengal Tenancy Act : *Kamaldhari v. Rameshwar* (1) referred to.

The omission to serve a notice under order 21, rule 22 of the Code of Civil Procedure is by itself sufficient to render an execution sale void for want of jurisdiction; for the notice is the very foundation of the jurisdiction : *Raghunath v. Sundar* (2) referred to.

Where every process prescribed by the legislature with a view to apprise the judgment-debtors or their representatives that execution was to proceed against them had been fraudulently suppressed: *Held*, that such a case was governed by section 47 of the Code of Civil Procedure, and the period of limitation was that provided by article 181 of the first schedule to the Limitation Act. To such a case, section 18 of the Limitation Act applied.

The burden rests upon the person, who has committed a fraud, to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to seek the assistance of the Court. *Rohimbhoy v. Turner* (3) referred to.

Application for revision by the Judgment-debtor.

Application to set aside execution sale.

The material facts and arguments appear from the judgment.

Babu Bankim Chandra Mookerjee for the Petitioner.

Babus Bipin Behary Ghose and *Satindra Nath Mukherjee* for the Opposite Party.

C. A. V.

* Civil Rule No. 357 of 1917, against an order of J. Jhonstone Esq., District Judge of Burdwan, dated the 19th March, 1917, reversing that of Babu Kishori Mohan Bose, Munsiff of Bishnupur, dated the 31st August. 1916.

(1) (1913) 17 C. W. N. 817.

(2) (1914) L. R. 41 I. A. 251; I. L. R. 42 Calc. 72; 20 C. L. J. 555.

(3) (1892) L. R. 20 I. A. 1; I. L. R. 17 Bom. 341.

The judgment of the Court was delivered by

Mookerjee, J.—We are invited in this Rule to consider the propriety of an order of refusal to set aside an execution sale in reversal of the order of cancellation made by the primary Court. On the 14th July 1905, Becharam Panja obtained a decree for Rs. 16-12 for arrears of rent against Kshetranath Tewari. On the 11th July 1908, the decree-holder applied for execution against the three infant sons of the judgment-debtor who had died meanwhile. In the application for execution, it was stated that the infants were under the guardianship of their mother. The amount for which execution was taken out was Rs. 28-9-0. The property was put up to sale on the 22nd September, 1908. The decree-holder was the only bidder present and the property was knocked down to him on his bid of Rs 25. The sale was confirmed on the 5th November 1908. On the 18th December, 1915, the maternal uncle of the infants applied to the Court to set aside the sale, on the allegation that it had been brought about by the fraudulent suppression of all processes and that the decree-holder had thereby managed to acquire a property worth at least Rs. 300 for a sum of Rs. 25. The application further stated that the petitioner had become aware of the sale of the property of his nephews only so recently as 29th November, 1915. The Court of first instance found upon every point in favour of the applicant. The Court held that the notice under section 248 of the Civil Procedure Code, 1882, the notice on the mother of the infants calling upon her to act as guardian *ad litem* of her infant sons, the writ of attachment, and the sale proclamation had never been served. There was further the significant fact that, in each instance, a false return of service had been made. The Court also found that the true value of the property was as alleged by the petitioner, and thereupon set aside the sale. On appeal, the District Judge stated that he saw no reason to differ from the conclusions of the first Court upon the various questions of fact and law, but he proceeded to express the opinion that a very important aspect of the case had been overlooked by every one concerned. He held that as the infants had failed to prove possession within two years of the date of the application, their title had been extinguished under Article 3 of Schedule III to the Bengal Tenancy Act read with section 28 of the Indian Limitation Act which applied by virtue of section 185 of the Bengal Tenancy Act. In this view, the District Judge set aside the order of the Court of first instance and dismissed the application for cancellation of the sale. There can be no doubt that the order of the District Judge cannot possibly be supported.

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It is plain that article 3 of the third Schedule to the Bengal Tenancy Act has no application to the case before us. It is well-settled that where a landlord, in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery through Court, such dispossession of the tenant is not dispossession within the meaning of article 3. *Kamaldhari v. Rameshur* (1). Indeed, so long as the sale remains in force, the possession of the landlord auction-purchaser cannot possibly be challenged by way of suit. On behalf of the decree-holder, the view taken by the District Judge has not consequently been supported. But an endeavour has been made to maintain the order of the District Judge on the ground that the application is barred by limitation. The argument in substance is that although the sale took place on the 22nd September 1908 and the right to apply for cancellation arose at that time, the present application, which was made on the 18th December 1915, must be governed by the Indian Limitation Act, 1908, which, by section 6, restricts in a large measure the advantage enjoyed by infants under section 7 of the Indian Limitation Act, 1877. It is pointed out that whereas under the law as it stood in 1908, the infants petitioners would have been entitled to make the application even after the attainment of their majority under the law as it stood in 1915, the application would be barred, unless it was made within the time prescribed in the third column of the first schedule; in support of this view, reliance has been placed upon the decisions in *Arayil v. Pelappakkara* (2); and *Chidambaram v. Karuppan* (3). The question raised does not, as we shall presently show, require consideration, in this case; but when it arises, it may require careful examination, in view of the principle recognised in the cases of *Munjhoori v. Akel Mahmud* (4); *Buddu Koer v. Hafiz Husain* (5), and *Gopeshwar v. Jiban Chandra* (6). It is plain, as the Courts below have found, that every notice contemplated by the Code has been fraudulently suppressed in this case. Now, as pointed out by the Judicial Committee in *Raghunath Das v. Sundar Das* (7), the omission to serve a notice under section 248 of the Code of 1882 or under order 21, rule 22 of the Code of 1908, is by itself sufficient to render the sale void for want of jurisdiction; for the notice is the very foundation of the

(1) (1913) 17 C. W. N. 817.

(2) (1910) I. L. R. 34 Mad. 292.

(3) (1910) I. L. R. 35 Mad. 678.

(4) (1913) 17 C. L. J. 316; 17 C. W. N. 889.

(5) (1913) 18 C. L. J. 274.

(6) (1914) I. L. R. 41 Calc. 1125; 19 C. L. J. 549.

(7) (1914) L. R. 41 I. A. 251; I. L. R. 42 Calc. 72; 20 C. L. J. 555.

jurisdiction. This view is in accord with a long series of cases in this Court. *Ramessuri v. Doorga* (1); *Gopal v. Gunamoni* (2); *Sahdeo v. Ghasiram* (3); *Livinia Ashton v. Madhabmoni* (4); *Imam v. Liakat* (5); *Parashram v. Balmukund* (6). It is further clear that the infants were not represented by a duly appointed guardian, as no notice was ever served upon the mother; nor was there any acceptance of guardianship by her: *Khiraj v. Daim* (7); *Narsingh Narain v. Jahi Mistry* (8); *Bal Kishan v. Topessar* (9); *Dinabandhu v. Mashuda* (10); *Purna v. Bejoy* (11); *Narendra v. Jogendra* (12); *Safdar v. Kishun* (13). This, consequently, is not a case where the Court is invited to set aside the sale merely on the ground of irregularity in publication or conduct of the sale. Here every process prescribed by the legislature with a view to apprise the judgment-debtors or their representatives that execution was to proceed against them had been fraudulently suppressed. The case is thus governed by section 47 of the Code of 1908, and the period of limitation would be that provided by Article 181 of the first Schedule to the Indian Limitation Act. It is further plain that this is pre-eminently a case where section 18 of the Indian Limitation Act applies. Here the judgment-debtors, who are infants, have been kept from the knowledge of their right to apply for a reversal of the sale, and as observed by Lord Hobhouse in delivering the opinion of the Judicial Committee in *Rohimbhoy v. Turner* (14), the burden rests upon the person, who has committed the fraud, to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to seek the assistance of the Court. The maternal uncle of the infants asserts that these proceedings were instituted by him within a few days of the date when he became aware of the fraudulent sale, and this has been believed by the Courts below.

(1) (1880) I. L. R. 6 Calc. 103.

(2) (1892) I. L. R. 20 Calc. 370.

(3) (1893) I. L. R. 21 Calc. 19.

(4) (1910) 11 C. L. J. 489.

(5) (1881) L. L. R. 3 All. 424.

(6) (1908) I. L. R. 32 Bom. 572.

(7) (1904) I. L. R. 32 Calc. 296; L. R. 32 I. A. 23; 1 C. L. J. 584.

(8) (1911) 15 C. L. J. 3.

(9) (1911) 15 C. L. J. 446.

(10) (1912) 16 C. L. J. 318.

(11) (1913) 18 C. L. J. 18; 17 C. W. N. 549.

(12) (1914) 20 C. L. J. 469; 19 C. W. N. 537.

(13) (1910) 12 C. L. J. 6.

(14) (1892) L. R. 20 I. A. 1; I. L. R. 17 Bom. 341.

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The result is that this Rule must be made absolute, the order of the District Judge set aside, and that of the Court of first instance restored. This order will carry costs both here and in the Court below. We assess the hearing-fee in this Court at three gold mohurs.

A. T. M.

Rule made absolute.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

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RADHA CHARAN CHANDRA AND OTHERS

v.

MAHARAJA RANJIT SINGH.*

Chowkidari law.—Land transferred to Zemindar.—Previous settlement with putnidar.—Assessment of rent.

The effect of a transfer of chowkidari land is to make the Zemindar hold the property subject to the rights previously created by him in favour of subordinate holders.

The rights of the Zemindar and the putnidar as between themselves are regulated by the conditions under which the putni was created. Where, definite information is not available as to the exact mode in which the putni rent was originally settled, the same basis of calculation in making assessment is adopted, as between the State and the Zemindar on the one hand and the Zemindar and putnidar on the other hand. The assessment is to be made on the basis of the annual value calculated according to the average rates of letting land similar in quality in the neighbourhood.

Appeal by the Defendants.

Suit for assessment of rent and for recovery of arrears.

The material facts and arguments appear from the judgment.

Babus Dwarka Nath Chuckerbutty, Surendra Nath Ghosal and Bejoy Kumar Chatterjee for the Appellants.

Babus Basanta Koomar Bose and Priya Sankar Majumdar for the Respondent.

* Appeal from Appellate Decree No. 2388 of 1915, against the decision of J. Phillimore Esq., District Judge of Birbhum, dated the 12th July, 1915, modifying that of Babu Kumudini Kant Roy, Munsiff of Rampurhat, dated the 4th June, 1914.

The judgment of the court was delivered by

Mookerjee, J.—This is an appeal by the defendants in a suit for assessment of rent and for recovery of arrears at the rate assessed. The lands in suit were originally chowkidari chākran and were situated within the ambit of the putni granted by the plaintiff to the predecessors in interest of the defendants on the 12th June, 1854. On the 12th September, 1899, the lands were resumed under the provisions of the Village Chowkidari Act, 1870, and were transferred to the plaintiff as the Zemindar. The plaintiff thereupon settled the lands with tenants. In 1904, the putnidars instituted a suit for ejectment on the allegation that they were under the terms of the putni lease, entitled to possession of those lands. In that litigation they were successful. The Zemindar now seeks to have rent assessed on those lands and to recover arrears with cesses and interest. It has not been argued before us that the putnidars are entitled to retain possession of those lands, upon payment to the plaintiff of the exact amount assessed by the Collector under the Village Chowkidari Act. It is indeed, conceded that the plaintiff as Zemindar is entitled to receive an additional amount. The question in controversy is as to the principle on which the additional amount should be determined. The Court of first instance held that the plaintiff was entitled to recover from the defendants rent calculated according to the following method: first, determine the annual value of the land as calculated by the collector under the Village Chowkidari Act; then, deduct therefrom one-half; the balance represents the amount payable by the Zemindar into the Chowkidari fund; the defendants should pay to the Zemindar one-half of this balance. This amount was calculated at Rs. 23-8 annually. On appeal, the District Judge has held that the plaintiff is entitled to have rent assessed on the basis of actual profits of these lands; he has found that the annual income is Rs. 190, and has on this ground determined Rs. 71-8as. as the amount annually payable by the defendants. We are of opinion that the view taken by the District Judge cannot be supported.

Section 51 of the Village Chowkidari Act provides that the order of transfer shall operate to transfer to the Zemindar the land therein mentioned, subject to the amount therein mentioned and subject to all contracts theretofore made in respect of, under, or by virtue of which any person other than the Zemindar may have any right to any land, portion of his estate or tenure, in the place in which such land may be situate. Schedule C furnishes the form of the order of transfer and shows that the effect of the transfer is to vest

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the property in the Zemindar, subject to the payment of the annual assessment to the Chowkidari fund and also subject to all contracts binding him in respect of any lands, portions of the said zemindari situated within the said village. The effect of the transfer is thus to make the Zemindar hold the property, subject to the rights previously created by him in favour of sub-ordinate holders. What then is the principle on which the assessment is based, so far as the Zemindar is concerned. Section 49 provides that all lands transferred under section 48 shall be subject to assessment which shall be fixed at one-half of the annual value of such land according to the average rates of letting land similar in quality in the neighbourhood of such land, and such assessment shall be made by the *purchayat* of the Village. Section 50 then provides that such assessment when made by the *punchayat* shall be submitted to the Collector of the district and he or any other officer exercising the powers of a Collector may approve, or revise and approve the same, provided that it shall be lawful for the Zemindar to contest the assessment before it is so approved, and after such approval the Collector of the district shall, by an order under his hand in the form in Schedule C, transfer to such Zemindar such land subject to the assessment so approved. Consequently the assessment is made on the basis of the annual value calculated according to the average rates of letting land similar in quality in the neighbourhood, and, the Zemindar is allowed an opportunity to contest the propriety of such assessment. In these circumstances, we are of opinion that while the annual value is taken as the measure which determines the assessment payable by the Zemindar to the Government, an entirely different basis should not be adopted to determine the amount payable by the putnidar to the Zemindar. This is subject to the reservation that the rights of the Zemindar and putnidar must be governed by the terms of the special contract between them. But in the absence of such special terms, the same basis of calculation should be adopted, as between the State and the Zemindar on the one hand and the Zemindar and the putnidar on the other hand. The view we take is supported by the decisions in *Hureck Chand Babu v. Charu Chandra Sinha* (1). The principle strictly applicable to cases of this character was laid down in the case of *Hari Narain Mozumdar v. Mukund Lal Mandal* (2), which was followed in *Rajendra v. Hira Lal* (3) and *Gopendra v. Tara Prasana* (4);

(1) (1910) 13 C. L. J. 102; 15 C. W. N. 5.

(2) (1900) 4 C. W. N. 814.

(3) (1910) 14 C. W. N. 995.

(4) (1910) 14 C. W. N. 1049; 1 L. R. 37 Cal. 598.

that principle is that the rights of the parties as between themselves must be regulated by the conditions under which the putni was created: *Kazi Nawaz v. Surendra* (1). Where, however, definite information is not available as to the exact mode in which the putni rent was originally settled, the principle we have explained may partly regulate the rights and obligations of the Zemindar and the putnidar. The result is that this appeal is allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored. This order will carry cost both here and in the Court of appeal below.

A. T. M.

Appeal allowed.

(1) (1906) 5 C. & L. J. 33; 1 L. R. 34 Calc. 109.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Beachcroft.*

GIRIS CHANDRA BIT AND OTHERS

v.

BEPIN BEHARY KHAN AND OTHERS.*

Inconsistent position—Detrimental.

Parties litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents.

Appeal by the Plaintiffs.

Suit for recovery of possession of land on declaration of title.

The material facts and arguments appear from the judgment.

Babu Karunamoy Bose for the Appellants.

Babus Dwarkanath Chuckerbutty and *Bijoy Kumar Bhattacharjee* for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title. The disputed land is claimed by the plaintiffs as situated within their village Bhuluk Khulla and by the Khan defendants as comprised within

* Appeal from Appellate Decree No 1924 of 1915, against the decision of C. Twidell Esq, District Judge, of Bankura, dated the 10th May, 1915, reversing that of Babu Mohar Lal De, Munsiff of Bishnupur, dated the 7th April, 1914.

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their village Sriramanipur. The Courts below have found that the title of the plaintiffs has been established, and the only question in controversy is whether the plaintiffs are entitled to a decree for recovery of possession.

There are two sets of defendants the Khans and the Sheiks. There was a previous suit between the plaintiffs and the Khans, which was instituted on the 13th September, 1906, and terminated on the 29th April, 1912. The plaintiffs in that suit claimed possession of the land now in dispute. The suit was dismissed by the Court of first instance, but, on appeal, was decreed by the Subordinate Judge. On second appeal to this Court, Mr. Justice Coxe remanded the case to the Subordinate Judge for trial of two issues. The defendants at the time urged before Mr. Justice Coxe that even if the title of the plaintiffs was established and was found not to have been extinguished by limitation, they were not entitled to actual possession, inasmuch as a lease granted by them to the Sheiks was still in force. Mr. Justice Coxe gave effect to this contention and ruled upon the authority of the decision in *Gulzar Singh v. Kalyan Chand* (1), that the plaintiffs could obtain, not actual possession but only declaration of their title. When the case went back to the Subordinate Judge, the plaintiffs offered to give evidence to show that the Sheiks had relinquished their tenancy and that they themselves were consequently entitled to recover actual possession on establishment of their title. The Subordinate Judge held that the judgment of the High Court on the point was conclusive and that it was not competent to him to hold that the lease in favour of the Sheiks had terminated before the institution of the suit. On the merits, he found that the disputed land was within the village whereof the plaintiffs were the admitted proprietors. As regards possession, he found that the plaintiffs were in occupation upto 1891, that in 1892 they let out the land to one Harbansa, and that the tenant had possession till he was dispossessed by the Khans in 1898. Subsequently, in 1901, the plaintiffs purchased the holding of Harbansa at a sale in execution of a decree for arrears of rent. The Subordinate Judge finally held that the plaintiffs became entitled to recover possession, only when they purchased the holding in 1901. But as the lease granted to the Sheiks in 1892 had not yet terminated, the plaintiffs were not entitled to recover actual possession. The result was that on the 29th April, 1912, a declaratory decree was made in favour of the plaintiffs. On the 5th April, 1913, the plaintiffs instituted this suit against the Khans

(1) (1893) I. L. R. 15 All. 399.

and the Sheiks for recovery of possession. The Court of first instance decreed the suit against both. The Sheiks did not appeal ; but on the appeal of the Khans the District Judge has dismissed the suit as against both sets of defendants. He has held in substance that there is no new cause of action for this suit and that the plaintiffs cannot now sue for a relief which they could and should have obtained in the previous litigation. In our opinion, this position cannot possibly be supported.

The Khans now contend that the lease granted by the plaintiffs to the Sheiks had terminated prior to the commencement of the previous suit. This is inconsistent with the allegation which the Khans made in the previous litigation. It is an elementary rule, based on the most obvious grounds of justice, equity and good conscience that parties litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents. The plaintiffs and the Khans are both equally bound by the decision of Mr. Justice Coxe that the lease in favour of the Sheiks was in force at the time of the institution of the previous suit, and presented an effective bar to the recovery of actual possession by the plaintiffs. The plaintiffs are now entitled to succeed on proof that on the date of the institution of this suit, there was not in existence, a sub-tenancy created by them which could bar a decree for recovery of possession in their favour. It would be manifestly unjust, if the defendants were allowed to defeat the present claim on proof that contrary to their previous allegation, a decree for recovery of possession might and should have been made in favour of the plaintiffs in the prior suit. In this view, the decree of the District Judge cannot be supported.

But it has been very inconsistently argued that the plaintiffs cannot succeed in this litigation unless they prove affirmatively that the lease granted by them in favour of the Sheiks in 1902 had terminated before the 5th April, 1913. There is abundant evidence to show that the Sheiks gave up their tenancy in 1905. The suit is thus in time, whether the time is taken to run against the plaintiffs from the date of the decree in the previous litigation or from the date of the accrual of the cause of action as determined in the previous litigation, namely, May, 1901.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

A. T. M.

Appeal allowed.

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Before Sir Asutosh Mookerjee, Knight Judge, and Mr. Justice Beachcroft.

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Contract of sale—Suit, nature of—Conveyance—Suit for specific performance.

The plaintiff sued for recovery of possession of land on declaration of title by purchase or for specific performance of a contract of sale. The case for the plaintiff was that the disputed property belonged to the first four defendants, that he obtained a conveyance from them and that his vendors had not only failed to register the document and to place him in possession but had transferred the property to the fifth defendant :

Held, that as regards the claim to enforce registration of the document executed in his favour by his vendor, he was bound to follow strictly the procedure prescribed by the Registration Act before he could institute a suit under section 77 to compel registration.

That the execution of the conveyance, not followed by registration, could not be regarded as fulfilment of the contract. The plaintiff was therefore entitled to proceed against his vendors to compel them to fulfil the contract.

That it was necessary for the plaintiff to join the fifth defendant as a party to the suit for specific performance.

Appeal by the Plaintiff.

Suit for recovery of possession.

The material facts and arguments appear from the judgment.

Babu Pannalal Banerjee (for *Babu Manmatha Nath Mukerjee*)
for the Appellant.

Babu Jyotis Chandra Hazra for the Respondent.

The judgment of the Court was delivered by

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Mookerjee, J.—This is an appeal by the plaintiff in a suit instituted by him on the 21st December, 1912, for recovery of possession of land on declaration of title by purchase or on specific performance of a contract of sale. The case for the plaintiff is that the disputed property belonged to the first four defendants, that he obtained a conveyance from them on the 30th November 1912, and that his vendors had not only failed to register the document and to place him in possession but had transferred the property to the fifth defendant. This latter conveyance bears date the 29th November

* Appeal from Appellate Decree No. 1087 of 1915, against the decision of Babu Bhupal Chandra Gangooly, Subordinate Judge of Midnapore, dated the 9th March, 1915, reversing that of Babu Satis Chandra Sen, Munsiff of Tamluk, dated the 15th December, 1913.

1912, but the plaintiff asserts that the document is collusive and has in fact been antedated. The Court of first instance found on the merits in favour of the plaintiff and decreed the suit. The Court held that the sale to the fifth defendant was collusive and without consideration and that although it purported to be anterior to the agreement whereon the plaintiff relied, the transaction took place really after the institution of this suit. Upon appeal the Subordinate Judge has reversed the decision of the trial Court and has dismissed the suit on the ground that the plaintiff was not competent to seek registration of the conveyance executed in his favour as he had not followed the provisions of the Indian Registration Act to compel registration of the document. In support of this view, the Subordinate Judge has relied upon the decisions in *Edun v. Mahomed* (1); *Lakhimoni v. Akromoni* (2); and *Ruhumutoolah v. Shuriutoolah* (3). In our opinion, the decree of the Subordinate Judge cannot possibly be upheld.

The plaintiff framed his suit in the alternative. As regards the claim to enforce registration of the document executed in his favour by his vendors, he was no doubt bound to follow strictly the procedure prescribed by the Indian Registration Act before he could institute a suit under section 77 to compel registration. But as regards the alternative claim to enforce specific performance of the agreement to sell, there was really no answer to the suit. Although the vendors had executed the document, they could not be deemed to have completely performed their part of the agreement. The agreement in essence was not merely to execute a conveyance which until registered, would be inoperative in law, but to transfer the full title from themselves to the plaintiff as purchaser. Such title could be transferred only by means of a registered instrument; consequently, the execution of the conveyance, not followed by registration, could not be regarded as fulfilment of the contract. The true position then is that the agreement to transfer remained unperformed and the plaintiff was entitled to proceed against his vendors to compel them to fulfil their contract. This is not opposed to the decision in *Ruhumutoolah v. Shuriutoolah* (3), as the plaintiff does not seek to found his title on the unregistered conveyance which is inoperative in law. It was necessary for the plaintiff to join the fifth defendant as a party to the suit properly framed for specific performance. That defendant claimed title under a

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(1) (1882) I. L. R. 9 Calc. 150.

(2) (1883) I. L. R. 9 Calc. 851.

(3) (1863) 10 W. R. 51 F. B.; 1 B. L. R. 58 F. B.

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conveyance ostensibly anterior in date to the agreement which is the foundation of the alleged title of the plaintiff. If the conveyance was in reality anterior to the agreement, the plaintiff has clearly no enforceable claim against that defendant. But if, on the other hand, the conveyance in favour of the fifth defendant has been antedated, the plaintiff can enforce his claim not merely against his vendors but also against that defendant, provided it is established that the latter has taken with notice of the agreement with the plaintiff. This relief could not have been obtained in a suit framed and instituted in accordance with section 77 of the Indian Registration Act, we cannot thus hold that the only remedy of the plaintiff was a suit of that description, because the consequence would be that the plaintiff, if successful in such a litigation would be driven to institute a second suit against the fifth defendant for establishment of his title and for recovery of possession. To avoid multiplicity of litigation, it was open to the plaintiff to frame his suit as he has done and to seek relief as well against his vendors as against their alleged transferee.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him in order that he may rehear the appeal on the merits. The question for investigation will be, whether the plaintiff has an enforceable claim against the fifth defendant on the basis of the agreement of sale alleged to have been made with him on the 30th November, 1912. In this connection, the question raised in the fourth issue will require consideration. The appellant is entitled to his costs both here and in the lower appellate Court.

A. T. M.

Appeal allowed: Case remanded.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Cuming.

CHANDRA KANTA BHATTACHARJEE AND OTHERS

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*Review—'Strict proof'—Civil Procedure Code (Act V of 1908), O. 47, R. 4
Proviso cl. (b)—Limitation—Sufficient Cause for extension.*

* Appeal from Order No. 222 of 1914, against an order of Babu Debendra Nath Pal, Subordinate Judge of Jessore, dated the 23rd March, 1914.

'Strict proof' in clause (b) of the proviso to rule 4, order 47 of the Code of Civil Procedure, means proof according to the formalities of law, and does not refer to sufficiency of proof in securing a particular conviction : *Ahid Khondkar v. Mahendra* (1) referred to.

A judgment was pronounced on the 23rd May, 1913; but the decree was not signed till the 30th May, 1913. An application for review on the ground of discovery of new evidence was made on the 18th December, 1913. The new evidence was not available to the petitioner for review till the 9th December, 1913 :

Held, that there was sufficient cause for not making the application for review before the expiry of the period of limitation prescribed therefor.

Appeal by the plaintiffs.

Application for review of judgment on the ground of discovery of new evidence.

The material facts are stated in the judgment.

Babu Brojo Lal Chuckerbutty for the Appellants.

Babus Sarat Chunder Roy Chowdhury, Satya Charan Sinha and Panchanon Ghose (for *Babu Haraprasad Chatterjee*) for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.—This appeal, preferred under order 47, rule 7 (1) of the Code of Civil Procedure of 1908, against an order granting an application for review of judgment on the ground of discovery of new evidence, is based on the reasons mentioned in clauses (b) and (c), namely, *first*, that the application was in contravention of clause (b) of the proviso to rule 4; and, *secondly*, that the application, was made after the expiration of the period of limitation prescribed therefor, and without sufficient cause. In our opinion, there is no force in either of these contentions.

Clause (b) of the proviso to rule 4 requires that no application for review on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made, shall be granted, without strict proof of such allegation. The appellants contend that the requirement of "strict proof," just mentioned, has not been fulfilled; their argument in substance is that the evidence does not conclusively prove that the new evidence on the discovery whereof the respondents based their application for review, was not within their knowledge and could not have been adduced by them when the judgment under review was passed. This contention, is in our opinion, based upon a misapprehension of the true meaning of the expression "strict proof" in clause (b) of the proviso to rule 4. The decision in *Ahid Khondkar v.*

(1) (1915) I. L. R. 42 Cal. 239.

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Mahendra Lal De (1) shows that 'strict proof' means proof according to the formalities of law, and does not refer to sufficiency of proof in securing a particular conviction. As Jenkins, C. J. observed, 'proof' means either conviction of the judicial mind on a certain fact or the means which may help towards arriving at that conviction, the word 'strict' in connection with the term 'proof' points out to the second of these two meanings. Consequently 'strict proof' means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence; it is formality that is prescribed and not the result that is described. In the case before us, the respondents, in support of their application for review, brought forward witnesses to depose what they did not and could not have become aware of the existence of the new evidence till the 9th December, 1913. No attempt was made by the appellants to challenge the truth of this allegation by cross-examination, and it is not for us to indicate the class of questions which might have been appropriately put to the witnesses to test their veracity. The decision sought to be reviewed was pronounced on the 23rd May, 1913. According to the respondents the new evidence, which forms the basis of the application for review, did not come to their knowledge till the 9th December, 1913, and the application for review was actually lodged in Court on the 18th December, 1913. In these circumstances, it is plain that there was strict proof of the allegation that the new evidence was not within the knowledge of the petitioners and could not have been adduced by them when the decree was passed: The first objection consequently fails.

The second objection taken is that the application was made after the expiration of the period of limitation prescribed therefor and without sufficient cause. The judgment was pronounced on the 23rd May, 1913; but the decree was not signed till the 30th May, 1913. The application for review should have been made within 90 days from that date; that is, on or before the 28th August, 1913. But the new evidence was not available till the 9th December, 1913. Consequently, there was sufficient cause for not making the application for review before the expiry of the period of limitation prescribed therefor. The second ground cannot accordingly be sustained.

The result is that the appeal fails and is dismissed with costs. We assess the hearing-fee at one gold mohur.

A. T. M.

Appeal dismissed.

(1) (1915) I L. R. 42 Calc. 830

PRIVY COUNCIL.

PRESENT: *Lord Buckmaster, Mr. Ameer Ali, and Sir Walter
Phillimore, Bart.*

DEBENDRA NATH DAS:

v.

BIBUDHENDRA MANSINGH BHARAMARBAR ROY.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

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1917.

December, 7.

1918.

February, 7.

Land Tenure in Bengal—Tenure-holder or raiyat—Area exceeding 100 standard bighas—Presumption that the tenant is a tenure-holder—Purpose for which the lease is granted—Cultivation by sub-lessee—Bengal Tenancy Act (VIII of 1885) Sec. 5. Sub-secs. (1), (4) and (5).

Defendant was assignee of a reclamation lease of over 100 standard bighas of land granted by plaintiff's predecessor for cultivation, without any restrictions as to the agency to be employed in such cultivation.

Held, that, under the circumstances, of the case, the presumption arising under sub section (5) of section 5 of the Bengal Tenancy Act that the tenant was a tenure-holder and not a raiyat, since the area exceeded 100 standard bighas was not rebutted by referring under sub-section (4)*b* of the same section to the purpose for which the right of tenancy was originally acquired.

Bibhudendra Mansingh Bhramarbar Rai v. Debendra Nath Das (1) affirmed.

Appeal from a decree of the Calcutta High Court (1) (Jenkins C. J. and Mookerjee, J.), dated July 11th, 1913, reversing a decree of Richardson, J., dated the 16th July, 1912.

The sole question involved was whether the defendant-appellant was a "tenure-holder" or a "raiyat" within the meaning of the Bengal Tenancy Act (VIII of 1885). Richardson, J. held that he was a raiyat: The appellate Bench of the High Court held that he was a tenure-holder: See *Bibhudendra Mansingh Bhramarbar Rai v. Debendra Nath Das* (1).

Hence this Appeal.

The facts are sufficiently stated in their Lordships' judgment.

De Gruyther, K. C. and *Sir W. Garth* for the Appellant:—The purpose for which the land was originally granted is the most important of all tests in determining whether a person is a raiyat, or a tenure-holder under Act VIII of 1885: *Durga Prosunno Ghose v. Kali Das Dutt* (2).

(1) (1913) 20 C. L. J. 140.

(2) (1881) 9 C. L. R. 449.

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That case was before Act VIII of 1885, but it was followed in *Laidley v. Gour Gobind Sarkar* (1).

The primary purpose here was cultivation by hired labour. It is unlikely the tenant meant to become a tenure-holder, because if he were that any person he put in would be raiyat and would have the occupancy rights of a raiyat.

The presumption under section 5, sub-section 5 that a tenant of over 100 standard bighas is a tenure-holder prevailed in *Gokul Mandar v. Pudmanund Singh* (2), only because there was no evidence in that case that the purpose was to acquire raiyati holding.

This suit purports to be brought under section 106 of the Act. The record-of-rights was prepared under sections 101, 102 and 105 and it was decided after due notice to the respondent that the appellant was a settled raiyat at a fixed rent. In the draft record, the appellant was shown as a tenure-holder but he lodged an objection which was decided in his favour. This suit has been brought only after final publication of the record. It was then no longer maintainable: Section 106 only provides for disputes arising before final publication.

[Their Lordships intimated that the present contention not being raised by appellant's case in the Courts below was not now open].

Sir Erle Richards, K. C., and *O'Gorman* for the respondents were not called upon.

Their Lordships' judgment was delivered by

February, 7.

MR. AMEER ALI:—The sole question involved in this appeal is whether the defendant-appellant is a "tenure-holder" or *raiya*t as defined in the Bengal Tenancy Act (VIII of 1885).

The defendant holds over 250 acres of land in the village of Goyalbank, forming part of the plaintiff's zemindari in the district of Cuttack, under a lease granted by the predecessor of the plaintiff in 1901 to one Gokulananda Chowdhury. In 1907 Gokulananda assigned the lease to the defendant.

The land covered by the lease became about the same time the subject of "record-of-rights" proceedings instituted by Government under chapter X of the Act.

These proceedings are taken by the revenue authorities before special officers for the ascertainment and record of all rights connected with the land within the ambit of the enquiry. At the

(1) (1885) I. L. R. 11 Calc. 501.

(2) (1902) L. R. 29 I. A. 196; I. L. R. 29 Calc. 707.

initial stage of the proceedings the defendant was entered as a "tenure-holder," but subsequently on his objection the Assistant Settlement Officer recorded him as "a settled *raiyat* at a fixed rent."

The present suit has been brought under the provisions of section 106 on behalf of the zemindar for rectification of the entry by recording the defendant as a "tenure-holder." The suit was first heard by the Settlement Officer, who upheld the plaintiff's contention as to the status of the defendant, and his decision was confirmed on appeal by the Special Judge of Cuttack. The defendant then preferred a second appeal to the High Court of Calcutta, which came for hearing before Richardson, J. The defendant renewed before that learned Judge his contention that under the terms of his lease he was entitled to be classed as a *raiyat*. Richardson, J., accepted his contention and reversed the order of the Special Judge, the effect of which was that the entry in the record-of-rights remained as made by the Assistant Settlement Officer.

An appeal was thereupon preferred by the respondent under section 15 of the Letters Patent, which came on for hearing before two Judges of the High Court, Jenkins, C.J., and Mookerjee, J., who, differing from Richardson, J., held, in concurrence with the Settlement Officer and the Special Judge, that the defendant was a tenure-holder (1). They accordingly reversed the order of that learned Judge, and restored the decree of the lower Courts for the rectification of the entry in the record of rights.

The present appeal to His Majesty in Council, which forms the sixth stage of this litigation, is an indication, not merely of the persistency of the defendant, but also of the valuable rights that are attached to his claim, for, if he be a tenure-holder, persons holding under him would have the status of *raiya*ts and would be entitled to acquire, after a certain efflux of time the right of occupancy under the Act. Whereas, if he be a *raiyat*, those persons would only be *under-raiya*ts, without the privileges or security afforded by the Act to *raiya*ts.

For the purposes of the Tenancy Act, tenants are classed under three heads, viz., tenure-holders, *raiya*ts, and *under-raiya*ts, that is to say, tenants holding, whether mediately or immediately, under *raiya*ts. *Raiya*ts, again are divided into three sub-classes, i.e., (a) *raiya*ts holding at fixed rates, (b) occupancy *raiya*ts, and (c) non-occupancy *raiya*ts. The defendant has been entered as a settled *raiyat* at a fixed rent, evidently on the ground that under the lease

(1) (1913) 20 C. L. J. 140.

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the rent payable by him is permanently fixed. But it is to be observed that fixity of rent is no criterion for the determination of the point at issue, for a tenure may be held at a fixed rent equally with a *raiya* holding. The question must, therefore, be decided on other considerations.

Sub-section (1) of section 5 defines a tenure-holder to mean :—

“Primarily a person who had acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes also the successors in interest of persons who have acquired such a right.”

And a *raiya* is defined to mean :—

“Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right.”

Sub-section (4) provides certain rules for determining whether a tenant is a “tenure-holder” or “*raiya*.” Clause (b) is important: it says, “The Court shall have regard to the purpose for which the right of tenancy was originally acquired.” Sub-section (5) is equally important. It provides that where the area held by a tenant exceeds 100 standard *bighas* (a little over 33 acres) “the tenant shall be presumed to be a tenure-holder until the contrary is proved.” In determining the status, therefore, of a tenant, viz, whether he is a tenure-holder or a *raiya*, two elements have to be borne in mind, *firstly*, the purpose for which the land was acquired, and, *secondly*, the extent of the tenure or holding. A close examination of the definition-clauses makes it quite obvious that both these elements are closely inter-related. The law assumes the *raiya* to be the actual cultivator of the soil, either by his own labour or the labour of members of his family or by hired labourers, and it assumes also that ordinarily a larger area than 100 *bighas* would make cultivation by the personal agency of the tenant improbable. The presumption provided in sub-section (5) of section 5 is founded on that hypothesis.

In the present case, the land held by the defendant amounts to more than 250 acres; the statutory presumption certainly applies to him. He seeks to rebut it by referring to the purpose for which the lease was granted. The terms of the document have been carefully examined by the Settlement Officer, the Special Judge, and the High Court. Their Lordships will, therefore, confine their remarks to its general features. It is an ordinary reclamation lease;

it leases the land permanently to the lessee at a fixed rent to cultivate the same, after making it fit for cultivation at his own expense and by his own efforts. In other words, he is to reclaim the land at his own expense and bring it under cultivation. The sixth clause makes this quite clear. It says :—

“You shall, by reserving water and raising bandhs [on the land leased,] make it fit for cultivation according to your will, and shall hold the same by cultivating it or having it cultivated, and you shall be competent to make such other arrangement or adopt such other convenient steps as you consider necessary for cultivating the same.”

The employment of the agency for the cultivation is left entirely to the option of the lessee; the land was leased for cultivation, that is, for agricultural purposes, but the agency to be employed is to be determined by the lessee; he has the power to establish *raiats* or under-lease it to others or cultivate it himself, if he can. It cannot be said that the purpose is, primarily or otherwise, that the demised land should be cultivated by his personal agency. At the best, the lease may be said to be equivocal. In their Lordships' opinion, the High Court and the lower Courts were perfectly right to look to the attendant circumstances to judge of the purpose for which the lease was acquired and to determine the status of the defendant. Apart from the facts appearing in the lease to which the learned Judges of the High Court have referred as indicating that the land was being taken for purposes other than that of personal and direct cultivation as a *raiya*, there is the outstanding circumstance that the land was leased to a man of means who appears to be a resident of another place for the purpose of reclamation and rendering fit for cultivation, the agency to be employed for carrying on the cultivation being left to his discretion.

Their Lordships think that the presumption under section 103B, on which the defendant relies, that an entry in a record-of-rights finally published “shall be presumed to be correct until it is proved by evidence to be incorrect,” is fully rebutted by the circumstances to which the Courts in India have referred in arriving at the conclusion that the defendant was a tenure-holder and not a *raiya*.

Their Lordships are of opinion that this appeal should be dismissed with costs and that they will humbly advise His Majesty accordingly.

E. Dalgado :—Solicitor for the Appellant.

The Solicitor, India Office :—Solicitor for the Respondent.

J. M. P.

Appeal dismissed.

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PRESENT: *Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.*

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1918.

February, 1.

RAI GANGA PERSHAD SINGH BAHADUR AND OTHERS

v.

ISHRI PERSHAD SINGH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Mortgage—Mortgage deed—Attestation—Purdanashin Executant—Direct evidence of execution required—Transfer of Property Act (IV of 1882), section 59—Privy Council—Practice—Remand.

The requirement as to attestation contained in section 59 of the Transfer of Property Act (IV of 1882), is not complied with unless the attesting witnesses are able to swear both to the act of execution and the identity of the person performing the Act.

Where, therefore, the only evidence was that the attesting witnesses were on one side of a purdah and the executant of the deed, a *purdanashin* lady, on the other; that her son took the deed behind the *purdah*, returned with it bearing a signature purporting to be hers, and said it had been signed by his mother, and that the witnesses thereupon attested;

Held, that the term of the section had not been complied with and that the mortgage was void.

Shamun Patter v. Abdul Kadir Ravutham (1) followed.

Padavath v. Ram Nain Upadhia (2), distinguished.

Their Lordships refused to take the unusual course of remanding for fresh evidence the appeal which had been argued and which ought *prima facie* to be decided upon the materials which were before the Courts below.

Appeal from a decree of the Calcutta High Court (Stephen and D. Chatterjee JJ.) dated August 12th, 1909, reversing a decree of the additional Subordinate Judge of Darbhanga, dated May 31st, 1907.

The plaintiffs-respondents sued to recover Rs. 12,875 due on a registered mortgage bond, dated 1893, executed by Mussammat Sharbat Koer, as certificated guardian of Balmukund Das. The latter, who had since come of age, confessed judgment, but the suit was opposed by the present appellants, who had purchased the mortgaged properties in execution of a money decree, and who contended *inter alia* that the suit was time barred.

The Subordinate Judge found this issue in respondent's favour and dismissed the suit. His finding was based on the ground that the suit was brought more than 6 years after due date and the bond

(1) (1912) L. R. 39 I. A. 218; I. L. R. 35 Mad. 607; 16 C. L. J. 596.

(2) (1915) L. R. 42 I. A. 163; I. L. R. 37 All. 474; 22 C. L. J. 165.

was not valid as creating a mortgage charge. The material part of his judgment was as follows:—

"The bond in suit is dated 23rd August, 1893, and the time of repayment of the debt was stipulated to be within 6 months from the date of the bond. The time of 6 months so fixed ended on the 23rd February, 1894, and from this date the period of limitation must have begun to run. To enforce the mortgage-charge created under the bond the limitation was 12 years from the due date, and to obtain a personal decree for a money-debt under the bond the limitation was 6 years from that date, and there can be no dispute about these propositions of law. The suit on the bond was instituted on the 23rd February, 1906, that is to say, after a lapse of 6 years from the due date and within 12 years from it. It is evidently clear, therefore, that if the bond was not valid as creating a mortgage-charge, the entire suit of the plaintiffs would fail as being barred by limitation. The question, therefore, arises whether the bond in suit can operate as a mortgage-bond.

"The defendant No. 4 contends under section 59 of the Transfer of Property Act, that the execution of the bond not having been duly attested as required by that section it cannot operate as a mortgage-bond. The executant of the bond was Sharbat Koer, the certificated gurdian-mother of the defendant No. 1. Section 59 of the Transfer of Property Act provides that a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Attestation means the attestation by witnesses of the execution of the bond: *Abdul Karim v. Salimun* (1). The execution of a document means and includes the signing and sealing and delivery of it. The question is, therefore, whether the bond in suit was attested as required by section 59 of the Transfer of Property Act, as failing which the mortgage purporting to have been created by it could not be effected. The ruling, *Tafeluddi v. Mohar Ali* (2), lays down "that in order that a mortgage-deed may be validly attested under section 59 of the Transfer of Property Act, it must be attested by two witnesses each of whom has seen the deed executed." The plaintiffs have examined in this suit two attesting witnesses of the bond. These witnesses are Ajodhya Pershad and Jharkhandi Pershad, but both of them say in plain terms that they did not see Sharbat Koer sign the bond. Jharkhandi further says that none of the attesting witnesses of the bond saw Sharbat Koer sign the bond. The witness Ajodhya says that he did not see her (Sharbat Koer) sign

(1) (1899) 1. L. R. 27 Cal. 190.

(2) (1898) 2 C. W. N. cccxix.

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the bond. From these statements it is transparently clear that the attesting witnesses did not see the bond being executed by Sharbat Koer, and this being so, no mortgage was, in view of the terms of section 59 of the Transfer of Property Act, effected by the bond. "The result is, therefore, that the plaintiffs have⁰ failed to prove the execution of the bond as required by section 59 of the Transfer of Property Act; and, consequently, the bond can not be taken to have effected a mortgage. Now, that the bond is not a mortgage-bond and the plaintiffs are not entitled to sue upon it to enforce a mortgage-charge and now that the suit to enforce a money-debt is out of time having been brought after a lapse of 6 years from the due date, the whole suit on the bond is barred by limitation."

On appeal, the High Court (Stephen and Digambar Chatterjee JJ.) reversed this decision and decreed the suit. They held that there was due attestation of the bond. "To hold otherwise," they said "would be to upset what we believe is a frequent practice in cases of the execution of deeds by *pardanashin* ladies, and in many cases to make attestation of the signature almost impossible."

Hence this appeal.

De Gruyther, K. C., and *K. Brown* for the Appellants: The bond here was not duly attested: no one saw the *pardanashin* lady Sharbat Koer sign. To have a valid mortgage in India two witnesses at least must see the executant sign: *Shamu Patter v. Abdul Kadir Ravouthan* (1).

In the subsequent case of *Padarath v. Ram Nain Upadhia* (2), it was found that the witnesses had seen the actual hand of the lady signing and recognised her voice. The facts here are widely different (Counsel was stopped).

Dunne, K. C., and *H. N. Sen*, for the Respondents: No issue on the precise point was raised. It arose incidently on a question of limitation: The debt was time-barred unless covered by a mortgage. There is evidence that the lady executed it and that the witnesses were present. Only they were on one side of the *pardah* and she on the other. The case should be remanded on account of the change in the authorities.

The case of *Shamu Patter v. Abdul Kadir Ravouthan* (1) only lays down that an attesting witness must be present at the execution itself, as distinguished from one who receives an acknowledgment afterwards. *Sight* only comes in from English cases, where there are no *pardanashin* ladies.

(1) (1912) L. R. 39 I. A. 218; I. L. R. 35 Mad. 607.

(2) (1915) L. R. 42 I. A. 163; I. L. R. 37 All. 474.

When the appeal was heard by the High Court in 1909 there had been a case where it was held that it was not necessary for an attesting witness to see a purdahnashin woman sign.

Their Lordships' judgment was delivered by

Viscount Haldane :—This appeal arises out of a suit which was brought by one Ishri Pershad and others to enforce an instrument of mortgage, dated in 1893, against the present appellants and others. The whole question before their Lordships turns, in the first instance, upon the validity of the instrument of mortgage which is sought to be enforced. It is argued on behalf of the appellants that the mortgage was invalid because it was not executed in the manner rendered necessary by section 59 of the Transfer of Property Act, 1882. Section 59 enacts that : "Where the principal money (sum) secured is 100 rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses." Now the question is : What is meant by the word "attested"? In the present case, all that is proved is that the mortgage was executed under circumstances which their Lordships will state very shortly. It was granted by a lady called Mussummat Sharbat Koer, who was the guardian of her son Balmukund Das, and she executed the mortgage on his behalf. She was a pardanashin lady, and the account given by the respondents' own witnesses of what happened was this : She was behind the *parda* when the document was taken to her for signature ; none of the witnesses saw her sign it ; her son came from behind the *parda* and said that it had been signed by her. That was all. The question is whether the witnesses who appended their names under these circumstances attested the document in accordance with the provisions of section 59. Now at one time there seems to have been a good deal of difference of opinion as to what "attested" meant. It will be observed that the words are not "attested and acknowledged," as is the case in some statutes, but "attested" only. At the time this appeal was decided by the High Court, this Board had not decided the case of *Shamu Patter v. Abdul Kadir Ravuthan and others* (1). In that case it was held, settling the law as to the interpretation of the words to which their Lordships have referred in section 59, that the section is not complied with if the witnesses have not been present at the execution of the instrument and have only attested on the subsequent acknowledgment of the signature. After that there was another case brought before this Board, which was relied on by the respondents as bringing the point in the present

(1) (1912) L. R. 39 I. A. 218 ; I. L. R. 35 Mad. 607 ; 16 C. L. J. 596.

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case, at any rate, much nearer. It was a case of *Padarath and others v. Ram Nain Upadhia and others* (1). The head note is as follows:—

“A mortgage deed purported to be executed by two pardanashin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that, although they could not see the faces of the executants, they heard them speak and recognised their voices.”

That is a very different case from a case of attesting on mere subsequent acknowledgment. It is a case in which the witnesses actually saw the hand of each lady, and in which they recognised her voice, and it is plain that, in the case of witnesses who were acquainted with the individuality of the lady concerned, they might very well recognise the hand which guided the pen and the voice sufficiently to be able to swear to the identity of the person who was performing the act. But that is very different case from the one before their Lordships upon the present occasion, where, not only was the actual attestation not witnessed by a hand put out from behind the curtain, but the voice was not heard, and what the witnesses went on was, in the main, the fact that the son came to them and said: “Here is the deed which my mother has executed.” That, in their Lordships’ opinion, is not enough to satisfy the terms of the statute. The mortgage is therefore void, and the appeal must succeed.

It has been suggested that the appeal should be referred back to the Court below, on the view which their Lordships take of the law (and it is a view which may be said to have been a somewhat novel one at the time of the decision of the High Court in Calcutta, given in 1909, three years before the first decision of the Judicial Committee to which their Lordships have referred), for the purpose of framing an issue to see whether it could be brought within the later decision about pardanashin ladies. But it is obvious that the facts, as proved here, fall far short and very remote from what was under consideration in the case to which reference has been made, and their Lordships see no justification for taking the unusual course of referring back an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that the respondents should pay to the appellants their costs here and in the Courts below.

T. L. Wilson & Co.:—Solicitors for the Appellants.

Ranken Ford & Chester:—Solicitors for the Respondents.

J. M. P.

Appeal allowed.

(1) (1915) L. R. 42 I. A. 163; I. L. R. 37 All. 474; 22 C. L. J. 165.

APPELLATE CRIMINAL.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr.
Justice Beachcroft.*

BENIMADHAB KUNDU AND ANOTHER

v.

KING-EMPEROR.*

CRIMINAL.

1918.

May, 3.

Criminal Procedure Code (Act V of 1898), Sec. 300—Jury—Retirement to consider—Communication with any person other than a juror, before delivery of verdict—Verdict, if to be set aside—Prejudice of the accused, if a necessary element for upsetting the verdict—Jury-trial—Judge, duty of.

Where after the Judge's charge to the jury had been delivered, the jury retired to consider their verdict, and a person other than a juror spoke to or held a communication with a member of the jury without the leave of the Court, before their return and delivery of the verdict :

Held, that the verdict should be set aside.

Having regard to the terms of section 300 of the Code of the Criminal Procedure, it is not necessary or relevant to consider whether the irregularity has in fact prejudiced the accused.

Rex v. Ketteridge (1) referred to.

The course to be adopted by the Court when the jury retire to consider their verdict after the charge has been delivered, pointed out.

Appeal under section 410 of the Code of Criminal Procedure.

The two accused persons were tried by the Additional Sessions Judge of Howrah and a jury, and were committed under section 412 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 5 years each.

The facts material for report will appear sufficiently from the judgment of Sanderson, C. J.

Babu Narendra Kumar Bose for the Appellants.

Mr. Orr. (Deputy Legal Remembrancer) and *Babu Manindra Nath Banerjee* for the Crown.

The following judgments were delivered :

Sanderson, C. J.—In this matter the point has been taken by the learned Vakil for the appellant that "the proceedings at the trial were vitiated by the fact that after the Judge's charge was

* Criminal Appeal, No. 117 of 1918, against the conviction and sentence passed by H. C. Maitland, Esq., Additional Sessions Judge of Howrah, dated the 30th January, 1918.

(1) (1915) I. K. B. 467.

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finished," I am now using the words of paragraph 12 of the petition "the members of the jury were found walking about in the compound of the Court and persons other than a juror were seen to speak to the members of the jury." Upon that being drawn to the attention of the Court, and the appeal having been admitted, apparently the learned Judges who admitted the appeal asked for an explanation with regard to this matter, and the learned Sessions Judge has reported as follows: "Just after the jury delivered their verdict in this case, the learned Vakil for the defence drew my attention to the fact that certain jurors had been seen out of their retiring room and talking to persons other than jurors after their retirement and before their return, I drew up a proceeding and questioned every one of the jurors, the full particulars of which will be found in the proceeding which forms a part of the record of this Court. In my opinion the juror's replies are perfectly true and the point is of no importance."

The result of the enquiry which the learned Judge made from the jurors is this: It appears that three of the jurymen after arriving in their retiring room went out into the compound for the purpose of relieving nature. The fourth who was a Mahomedan went out of the retiring room into the compound for the purpose of saying his prayers, and the fifth jurymen remained in the retiring room. The fourth jurymen in his answer to the learned Judge admits that while he was outside the retiring room, a man spoke to him and asked him a question and he replied to it. The learned Vakil for the appellant has argued that in view of this fact the verdict which involved the conviction of the appellant cannot stand; and, he relied on section 300 of the Code of Criminal Procedure which is in these terms, "In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict. Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury." That is an explicit direction to the Court with regard to the course to be adopted when the jury retire to consider their verdict after the charge has been delivered: and it seems to me in view of the undoubted facts in this case that this verdict cannot stand for the reason that it is clear that a person other than a juror did speak to and hold a communication with a member of the jury after the charge had been delivered, and it was without the leave of the Court. The result is that this verdict must be set aside.

It will be open to the crown to proceed further with the case if it be so advised.

It is not necessary for us, and it would not be right, in my opinion, to enquire into what was the nature of the question which was put by the person other than a juror to the juror or what was the answer. It is said by the learned Judge in his report to us that in his opinion the point is of no importance. With great respect to the learned Judge, I cannot agree with him. I think it is a matter of great importance that the section of the Act, which is explicit in its terms should be observed.

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In the course of the argument a case was cited to us, *vis. R. v. Ketteridge*, (1) which is reported. Of course it is no authority upon the point in this Court, because we have to decide the question according to the section of the Act: and, I only refer to it upon this question of importance. The learned Judges in giving their judgment in that case said, "In our opinion it is not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner." Having regard to the terms of section 300, if it is proved, as it was in this case, that after the charge had been delivered, a person other than a juror spoke to or held a communication with a member of the jury without the leave of the Court, in my judgment that is sufficient to upset the verdict: and, in order to show how important it is regarded that no one other than a juror should speak to the jury without the leave of the Court after a charge has been delivered, I refer to the English Act of 1897 called the Juries Detention Act, which provides in the first section "upon the trial of any person for a felony other than murder, treason, or treason felony, the Court may, if it see fit, at any time before the jury consider their verdict, permit the jury to separate in the same way as the jury upon the trial of any person for misdemeanor are now permitted to separate." It therefore appears that the Legislature in giving power to the Court to allow the jury to separate in felony cases, other than those specifically mentioned, did not give the Court power to allow the jury to separate after they had retired to consider their verdict, for we find the words "at any time before the jury consider their verdict" are put into the section.

My learned brother and I are of opinion that we ought to say something with regard to the general question, because the matter which was the basis of this appeal could easily have been prevented if proper precautions had been taken when the jury retired to consider their verdict. We hope that in future the learned Judge who presides over the Court will see that proper precautions are taken to make it impossible, after the charge has been delivered and when

(1) (1915) 1 K. B. 467.

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the jury retire to consider their verdict, for any one other than a juror to speak to the jury or communicate with the jury without the leave of the Court. It may be pointed out that this was a case, the trial of which took eight days, and the result of this irregularity which could have been easily prevented by the taking of proper precautions is that the time occupied by the trial is altogether thrown away.

We direct that until a fresh trial, if any, the accused be enlarged on bail to the satisfaction of the District Magistrate.

Beachcroft, J.—I agree.

A. N. R. C.

Verdict set aside.

APPELLATE CIVIL.

Before Mr. Justice Richardson and Mr. Justice Beachcroft.

SITIKANTA ROY AND OTHERS

v.

BIPRADAS CHARAN AND OTHERS.*

CIVIL.

1918.

January, 22.
March, 23.

Ghatwali land—Occupancy right, acquisition of—Bengal Tenancy Act (VIII of 1885), Secs. 19, 181.

From 1859 to 1885 ghatwali lands were subject to the acquisition of occupancy right. Section 181 of the Bengal Tenancy Act does not take away such rights acquired or enjoyed.

Ram Kumar v. Ram Newaj (1) and *Mrittunjoy v. Kenatullah* (2) referred to. *Mohe k v. Pran Krishna* (3) and *Upendra v. Ram Nath* (4) distinguished.

Appeal by the Plaintiffs.

Suit for ejectment.

The material facts are stated in the judgment.

Babu Sib Chandra Palit and *Jadu Nath Mandal* for the Appellants.

Babu Bhupendra Nath Bose (for *Babu Jogendra Kumar Dey*) for the Respondents.

C. A. V.

The judgments of the Court were as follows:—

Richardson, J.—This appeal is preferred by the plaintiff in a suit in ejectment. The land in question is situated in Ghat Chota Bankadaha in the district of Bankura and was formerly Ghatwali land: It was resumed by the government in or about the year 1900 and transferred to the Maharaja of Burdwan as zemindar or proprietor.

* Appeal from Appellate Decree No. 2336 of 1915, against the decree of C. Tindall Esq., District Judge of Bankura, dated the 10th July, 1915, affirming that of Babu Debendra Prosad Bagchi, Munsiff of Bishunpur, dated the 28th April, 1911.

(1) (1904) I. L. R. 31 Calc. 1021.

(3) (1904) I C. L. J. 138.

(2) (1906) 5 C. L. J. 53.

(4) (1906) I. L. R. 33 Calc. 630.

March, 23

The Maharaja then in July 1908 granted a mokarari lease of the land to the former ghatwal, Thakur Das Laik, who thus ceased to be a ghatwal and became an ordinary tenure-holder. Subsequently, but before the expiration of 12 years from the date of the resumption, the tenure was put up for sale in execution of a decree for arrears of rent obtained by the Maharaja against Thakur Das and the plaintiff became the purchaser. The defendants in the suit (Bipradas Charan and others, called the Charans) held the lands as cultivating tenants under Thakur Das both before and after he ceased to be a ghatwal. Upon their resisting the plaintiffs attempt to obtain actual possession, the plaintiff caused notices to be served upon them under section 167 of the Bengal Tenancy Act, purporting to annul their interests as being incumbrances within the meaning of section 161. Having done so, he brought the present suit to eject them. Their case is that being occupancy raiyats, their interests are "protected" interests.

It should be mentioned that so far as I can gather from the somewhat confused statement of the Court below, the land to which the appeal relates forms part of a larger area which before resumption by Government was held in common by nine ghatwals and a shadial. The share of the shadial was six annas and the share of each ghatwal one-ninth of ten annas. The defendants were tenants-in-common of a holding under the ghatwals and shadial which comprised an area of between 600 and 800 bighas. After the resumption the Maharaja granted to each ghatwal and the shadial a separate mokarari lease of his share, but the land was not divided. Each ghatwal thus came to hold his one-ninth undivided share of ten annas of the whole as a separate tenure. The defendants also continued in joint possession of their holding, but as to the rent payable in respect of it, Thakur Das collected his share separately. It may be assumed in the present case that the defendants held a separate tenancy under Thakur Das to the extent of his share whatever that share may be.

The District Judge in the lower appellate Court has found that at the date of the suit the defendants and their ancestors had been in possession of this holding as cultivating tenants for about a hundred years at an unvaried rent of Rs. 33 odd per annum.

The only plots now in dispute are plots 5 and 6 of the plaint. The suit as regards plots 1—4 has already been finally disposed of.

A number of questions have been discussed in the Courts below, whether the plaintiffs could sue without making the other *mokararidars* parties to the suit, whether the interest of the Charans,

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under the plaintiff is an "incumbrance" within the meaning of section 160 of the Bengal Tenancy Act and so forth. These questions have been decided by one Court or the other against the plaintiff but it may be assumed that they were wrongly so decided, and that they ought to have been decided in his favour.

The question which really emerges and requires consideration is this. The Charans are found to be raiyats. They claim to be occupancy raiyats and if the lands had not been ghatwali lands, they would clearly be entitled to occupancy rights. Can such rights be acquired in ghatwali lands? This was the question to which the argument before us was principally directed.

Under section 181 of the Bengal Tenancy Act, "nothing in the Act is to "affect any incident of a ghatwali or other service tenure." The precise effect of this provision has occasioned some doubt.

The argument for the Charans is that whatever may be its effect on the present law there is nothing in Act X of 1859 or in Bengal Act VIII of 1869 to prevent occupancy rights being acquired or enjoyed in ghatwali land. The Charans, it is said, acquired such rights before the Bengal Tenancy Act came into force and section 181 cannot operate to take away rights which had already been acquired. On the contrary, if occupancy rights could be acquired under the Acts of 1859 and 1869, section 181 would have no application to rights in existence at the time it was enacted and such rights would be preserved by section 19.

On the other hand the learned pleader for the plaintiff contends that it has been held by this Court in the cases of *Mohesh Majhi v. Pran Krishna Mandal* (1), and *Upendra Nath v. Ram Nath* (2), that occupancy rights cannot exist in ghatwali land. The decision however of Mitra, J. in the former case appears to have been confined to the acquisition of occupancy right in ghatwali land after the passing of the Bengal Tenancy Act and was so understood in *Gourikanta v. Ram Gopal* (3). In *Upendra Nath v. Ram Nath* (2), the point whether occupancy rights had been acquired by the appellants before the Bengal Tenancy Act came into force was apparently neither raised nor considered. Sir Francis Maclean, C. J., no doubt says, after citing *Mohesh Majhi's* case (1), that "upon principle, having regard to the nature of ghatwali lands, the acquisition of occupancy rights in these lands is inconsistent with the incidents of such tenures." But he supports this view by reference to section 181

(1) (1904) 1 C. L. J. 138.

(2) (1906) I. L. R. 33 Calc. 630.

(3) (1905) 2 C. L. J. 379 (383).

of the Bengal Tenancy Act and does not refer to the fact that that section had no counter part in the earlier Acts.

In *Babu Lal Sheikh v. Purna Chandra Babu* (1), Sir Lawrence Jenkins, C. J., expressly refused "to express any opinion as to whether or not an occupancy right can be acquired in land held under ghatwali tenure."

In *Ram Kumar Bhattacharjee v. Ram Newaj Rajguru* (2), Geidt and Mookerjee, JJ., held that rights of occupancy might be acquired in Chaukidari Chakran lands under section 6 of Act X of 1859 and section 6 of Bengal Act VIII of 1869. There seems no reason why ghatwali lands should be differentiated from Chaukidari Chakran lands in this respect.

The case of *Mrittunjoy Roy Chowdhury v. Kenatullah* (3), also relates to Chaukidari Chakran lands. The question there arose in a form which renders the case of doubtful assistance to either side but the learned Judges (Ghose and Caspersz, JJ.) seem, at least in one part of their judgment, to take it almost for granted that where the service-holder's interest may be regarded as that of a middleman, occupancy rights may be acquired by the cultivating raiyats even under the Bengal Tenancy Act. No reference, however, is made to section 181 or to Mr. Justice Mitra's decision.

The question on the authorities seem to divide itself into three parts :—

(1) Whether occupancy rights are inconsistent with the nature of ghatwali tenures and their incidents according to the general principles of law applicable to the topic.

(2) Whether irrespective of the answer to question (1) the Acts of 1859 and 1869 conferred on the raiyats of ghatwali land statutory rights of occupancy.

(3) Whether, if questions (1) and (2) be answered in the affirmative; section 181 of the Bengal Tenancy Act has had the effect of depriving the raiyats, from the date of the passing of the Act, of any further opportunity to acquire occupancy rights.

I have not complicated the matter by referring to the possible existence in particular places of local customs modifying the general law or the tenancy law.

In the present case it is fortunately not necessary for us to consider the first or the last of the above three questions. At any rate section 181 does not take away any rights of occupancy acquired or enjoyed under the Acts of 1859 and 1869. The only question we

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(1) (1909) 10 C. L. J. 602.

(2) (1904) I. L. R. 31 Calc. 1021.

(3) (1906) 5 C. L. J. 53.

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need consider is the second and it seems to me that there is sufficient authority in the cases I have cited for saying that at any rate from 1859 to 1885 ghatwali lands were subject to the acquisition of occupancy rights.

On the question of fact both the Courts below have found that the Chārāns were in possession as cultivating raiyats under the ghatwal for more than twelve years before 1885. They, therefore, acquired occupancy rights and the interest so acquired continues to the present day and is a protected interest which the plaintiff cannot annul.

The result is that in my opinion the decrees of the Court below dismissing the suit so far as it relates to plots 5 and 6 should be affirmed and this appeal dismissed with costs.

Beachcroft, J.:—I agree.

A. T. M.

Appeal dismissed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Walmsley.

SIB CHANDRA BANERJEE

v

SURENDRA CHANDRA MANDAL AND OTHERS.*

CIVIL.

1917.

May, 3.

Chowkidari chakran land—Resumption—Transfer to Zemindar—Tenants, position of—Village Chowkidari Act (VI. B. C. of 1870, section 51.

The chowkidari chakran lands included in a revenue-paying estate forms part of the revenue-paying estate and the Zemindar has a qualified title therein. Consequently when the lands are resumed under the Village Chowkidari Act and are transferred to the zemindar in accordance with its provisions, the estate taken by the zemindar is in confirmation and by way of continuance of his existing estate. The zemindar incurs a liability to pay additional revenue to the Government in respect of this land: *Ranjit Singh v. Kali Dasi* (1) followed.

The object of section 51 of the Village Chowkidari Act is to maintain the validity of contracts made in respect of chowkidari chakran lands, and it is immaterial, whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings.

* Appeals from Appellate Decrees Nos. 112 and 158 of 1915, against the decision of Babu Asutosh Ghose, Subordinate Judge of Burdwan, dated the 18th November, 1914, reversing that of Babu Peary Mohan Chatterjee, Munsiff of Katwa, dated the 3rd December, 1913.

(1) (1917) 25 C. L. J. 499.

Where upon the chowkidar's vacating the lands, the zemindar took possession and allowed the chowkidar's tenants to occupy the lands as his tenants :

Held, that on a transfer effected in favour of the zemindar under the provisions of the Village Chowkidari Act, a transferee of the zemindar could not treat the tenants as trespassers.

Appeal by the Plaintiff.

Suit for recovery of possession of lands on declaration of title.

The material facts and arguments are set forth in the judgment.

Babu Ram Chandra Mozumdar for the Appellant.

Babus Joges Chunder Roy and *Haradhone Chatterjee* for the Respondents.

The judgment of the court was delivered by

Mookerjee, J.—S. A. 112 of 1915: This is an appeal by the plaintiff in a suit for recovery of possession of lands on declaration of title. The lands were originally chowkidari chakran lands included in a revenue paying estate situated within the jurisdiction of the collector of Murshidabad. The chowkidars who were in occupation disappeared many years ago. The zemindar thereupon appropriated the lands, dealt with them as included in his estate, and settled them with the defendants as tenants. The Subordinate Judge has found that the defendants have been in occupation for many years as tenants, under the proprietor. On the 21st January, 1909, the lands were resumed by the Government, and, on the day following, they were transferred to the zemindar in accordance with the provisions of the Village Chowkidari Act, 1870. On the 23rd December 1911, the plaintiff obtained a permanent under-tenure from the zemindar, and, on the 3rd October, 1912, he instituted this suit for ejectment of the defendants on the ground that they were trespassers unlawfully in occupation of the disputed lands. The Court of first instance decreed the suit. Upon appeal that decision has been reversed by the Subordinate Judge. In this Court, the decision of the lower appellate Court has been attacked on the ground that, on the facts found, the zemindar had no authority to settle the lands with the defendants before they had been resumed and transferred to him under the provisions of the Village Chowkidari Act, and that the defendants must consequently be treated as trespassers. In our opinion there is no foundation for this contention.

The decision of the Judicial Committee in the case of *Ranjit Singh v. Kali Dasi Debi* (1), leaves no room for doubt that these chowkidari chakran lands formed part of the revenue-paying estate and that the zemindar had a qualified title therein. Consequently,

(1) (1917) 25 C. L. J. 499 ; 21 C. W. N. 609.

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when the lands were resumed under the Village Chowkidari Act and were transferred to the zemindar in accordance with its provisions, the estate taken by the zemindar was in confirmation and by way of continuance of his existing estate. It is thus impossible to maintain the proposition that when the land vacated by a chowkidar passed into the possession of the zemindar, the latter became a trespasser. The zemindar, no doubt, incurred a liability to pay additional revenue to the Government in respect of this land. The amount of such revenue was determined by an appropriate proceeding under the Village Chowkidari Act when the lands were resumed and transferred to the zemindar. But as explained by the Judicial Committee, the zemindar had a subsisting interest in the land and the new estate vested in him was merely in continuation and confirmation of that pre-existing interest. What, then, is the true position? The chowkidars vacated the lands; the grantor of the plaintiff thereupon took possession of those lands and allowed the defendants to occupy the lands as his tenants, possibly on the erroneous assumption that they formed *mal* lands of his zemindari; subsequently, a transfer was effected in his favour under the provisions of the Village Chowkidari Act. The plaintiff is clearly not competent to contend that the defendants, who were brought upon the lands as tenants by his grantor, are trespassers. An argument has been based on section 51 of the Village Chowkidari Act, to the effect that the section applies only to cases where there has been a contract by the zemindar in respect of lands other than chowkidari chakran lands. In our opinion, there is no foundation for this limited construction of section 51. The object of section 51 is to maintain the validity of contracts made in respect of chowkidari chakran lands, and it is immaterial, whether such contracts do or do not, also include other lands which are in no way affected by the resumption proceedings. We hold accordingly that the Subordinate Judge has taken a correct view of the relative rights of the parties and that the suit has been properly dismissed. It is not necessary for us to determine the precise status of the defendants as tenants under the plaintiff; for it is a sufficient answer to the claim for ejectment that the defendants are not trespassers but tenants. The decree of the Subordinate Judge is accordingly affirmed and this appeal dismissed with costs.

This judgment will govern the other appeal (S. A. 158 of 1915) which is also dismissed with costs.

A. T. M.

Appeals dismissed.

Before Mr. Justice Richardson and Mr. Justice Walmsley.

DHRUPAD CHANDRA KOLEY AND OTHERS

v.

HARI NATH SINGHA ROY*

CIVIL.

1918.

March, 1, 23,

Rent, enhancement of—Bengal Tenancy Act (VIII of 1885), Sec. 52—Burden of proof—"The area for which rent had been previously paid," meaning of—Second Appeal—Decision on surmises and conjectures.

The question in every case coming under section 52 of the Bengal Tenancy Act, the landlord being the claimant, is whether the tenant is in possession of land "in excess of the area for which rent has been previously paid by him."

The burden of proving an increase in "the area for which rent has been previously paid" is on the landlord. He may generally discharge the burden in two ways :

(1) By proving that the tenant is in possession of excess land outside the boundaries of the land originally settled with him, for instance land obtained by encroachment or alluvial increment.

(2) By proving that at the original settlement of the land the rent was fixed at a rate per bigha or other unit of measurement or at differential rates according to the quality of the land and so forth, and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable under such agreement.

It is in connection with this second method of proving a right to increase of rent, that questions may arise under clause (2) (a) of section 52 as to the conditions of the tenancy and whether the rent originally fixed was or was not a consolidated rent for the whole area. The rent might be a consolidated rent even if it was calculated at so much per measured or estimated bigha. The question depends on the true intention of the parties to be gathered, in the absence of a written instrument, from all the circumstances. When, however, it is proved that the tenant is holding land outside and beyond the original boundaries, the question as to the rent being a consolidated rent, cannot well arise, except possibly in connection with land gained by alluvion.

The words "the area for which rent has been previously paid" mean the area with reference to which the rent previously paid had been assessed or adjusted.

* Appeals from Appellate Decrees Nos. 466 to 471 of 1916, against the decision of Babu Ashutosh Ghosh, Subordinate Judge of Hooghly, dated the 9th September, 1915, reversing those of Babu Sisir Kumar Ghosal, Munsiff of Serampur, dated the 29th August, 1914.

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Rajendra v. Chunder (1) referred to.

It is open in second appeal to attack a decision based not on evidence but on surmises and conjectures.

Appeals by the Defendants.

Suit under section 52 of the Bengal Tenancy Act for enhancement of rent

The material facts are set forth in the judgment of Mr. Justice Richardson.

Babus Bepin Behary Ghose and *Narendra Nath Chowdhury* for the Appellants.

Babus Surendra Chandra Sen and *Kaisari Singh Roy* for the Respondent.

C. A. V.

The judgments of the Court were as follows :

March, 23.

Richardson, J.—This second appeal arises out of a suit brought under section 52 of the Bengal Tenancy Act for enhancement of rent on the ground that the tenants are in possession of land "proved by measurement to be in excess of the area for which rent has been previously paid."

Gouri Pattra's case (2) is the ruling authority upon the main principles governing such a claim. It is true that clauses (5) and (6) have since been added to the section, clause (5) by the amending Act 1898 and clause (6) by the amending Act of 1907. But clause (5) merely corrects a misapprehension which had arisen in regard to a particular passage in the judgment in *Gouri Pattra's* case (2), [*Rajkumar v Ram Lal* (3)] and clause (6) only applies when such a practice has been proved by the landlord or tenant as is mentioned in the clause.

If regard be had to the terms of the section itself, the question in every case, the landlord being the claimant, is whether the tenant is in possession of land "in excess of the area for which rent has been previously paid by him" [section 52 (1) (a)]. Light is thrown on the meaning of the words by clause (2). That clause lays down that "in determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to" four matters of which I need only mention three:—

"(a) the origin and conditions of the tenancy, for instance, whether the rent was a consolidated rent for the entire tenure or

(1) (1901) 6 C. W. N. 318.

(2) (1892) I. L. R. 20 Calc. 579.

(3) (1907) 5 C. L. J. 538 (540).

holding
 (c) the length of time during which the tenancy has lasted without dispute as to rent or area ; and (d) the length of the measure used or in local use at the time of the origin of the tenancy as compared with that used or in local use at the time of the institution of the suit."

The burden of proving an increase in "the area for which rent has been previously paid" is on the landlord. Speaking generally he may discharge the burden in two ways :—

(1) By proving that the tenant is in possession of excess land outside the boundaries of the land originally settled with him, for instance, land obtained by encroachment or alluvial increment.

(2) By proving that at the original settlement of the land the rent was fixed at a rate per bigha or other unit of measurement or at differential rates according to the quality of the land and so forth, and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable under such agreement.

It is in connection with this second method of proving a right to increase of rent that questions may arise under clause (2) (a) as to the conditions of the tenancy and whether the rent originally fixed was or was not a consolidated rate for the whole area. The rent might be a consolidated rent even if it was calculated at so much per measured or estimated bigha. The question would depend on the true intention of the parties to be gathered in the absence of a written instrument from all the circumstances. When, however, it is proved that the tenant is holding land outside and beyond the original boundaries, the question as to the rent being a consolidated rent, cannot well arise, except possibly in connection with land gained by alluvion.

This second method is that to which the learned Judges in *Gouri Pattrā's* case (1) refer, when they speak of the landlord showing "that the previous settlement was made on the basis of a measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other reason he had hitherto lost."

In *Rajendra v. Chunder* (2), Banerjee, J. said that the words "the area for which rent has been previously paid" mean the area

(1) (1892) I. L. R. 20 Cal. 579.

(2) (1901) 6 C. W. N. 318.

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with reference to which the rent previously paid had been assessed or adjusted. That was a case where enhancement was claimed by the first method but the language is applicable also to the second method. The cases as I understand are brought together in this sense in the judgment of Coxe, J. in *Akbar Ali v. Mussamat Hira Bibi* (1) in which N. Chatterjee, J. concurred.

The case of *Lukhi Narain v. Sri Ram Chandra* (2), is probably to be regarded as an example of the first method available to the landlord, but if it be assumed that the tenant there had been holding the same land throughout and that the area of the land was in the first instance wrongly or inaccurately measured or calculated, then the case would be an example of the second method.

As to the effect of clause (6) with which we are not immediately concerned reference may be made to *Uma Singh v. Rai Tarini Prosad Bahadur* (3), when *Lukhi Narain's* case (2) is cited.

I have said so much because it seemed necessary, for the purposes of the case before us, to endeavour to obtain a clear understanding of what the law is. I come now to the present case. In the lower appellate Court the plaintiff has secured an enhancement of rent and before us the tenants, the defendants, are the appellants.

The first objection taken on their behalf to the judgment of the learned Subordinate Judge in the lower appellate Court is this. There were several suits tried together. The Subordinate Judge says that a defendant in one of the suits, Nirod Koley, had in his possession a chitta of the year 1227 which he failed to produce when called upon to do so. The Subordinate Judge refers to this document as the suppressed chitta and the complaint made is that he has fastened upon the tenant defendants in all the suits a responsibility for the non-production of the chitta which ought to belong to Nirod Koley alone. It remains, however, that the suits were tried together without objection by the defendants. The evidence given, so far as it was general in its character, applied to all the suits. The several defendants or sets of defendants were all sailing in the same boat. No defendant dissociated himself from Nirod Koley. In the circumstances it would be difficult to say that the defendants were not all alike affected by his conduct at any rate none of them displayed any anxiety to forego any advantage that might accrue therefrom.

Then it is objected that the Subordinate Judge has decided the case not on the evidence but on surmise and conjecture, and that no doubt raises a question which is open in second appeal.

(1) (1912) 16 C. L. J. 182.

(2) (1911) 15 C. W. N. 921.

(3) (1913) 19 C. L. J. 451.

It is said for instance that the chitta of 1227 is a myth and there is no evidence to establish the existence of such a document. But the Subordinate Judge says that Nirod Koley and his father and uncle were gomastas under previous patnidars and he refers to evidence that "this chitta, be it the original or the copy, was invariably consulted by the tenants of the mehal whenever the transfer of a holding took place and the Koleys charged a fee for this reference." It is clear that the document so consulted should have been produced.

Then again it is said the Subordinate Judge has speculated as to the effect of the chitta and his conclusions must be rejected. The case stands thus :—

In the year 1305, the mehal of which the plaintiff is now patnidar came directly under the Burdwan Raj and a *hastabud* or rent-roll, was prepared by the officers of the Raj—as to this the Subordinate Judge says :—

"The area and annual rent of such [? each] holding are given in this *hastabud* and the tenants not only testified to the accuracy of the entries by their respective signatures but by accepting rent receipts for a considerable number of years without any protest."

The Subordinate Judge has no doubt used the suppression of the chitta as a ground for inferring that the arrears mentioned in the *hastabud* and the dakhilas were taken from the chitta. He refers to the evidence of Adhar Koley, one of the tenants, who, speaking apparently for all the tenants, said that the quantity of land stated in the dakhilas was correct and that he could not say how the quantity of land was incorporated in the dakhilas. The Subordinate Judge goes on :—

"His statements strike at the root of the defendants 'daksurat' theory"—that is, that the areas entered according to common repute, "and show that these minute specifications of areas and the annual rents in the rent receipts were taken from the chitta of 1227, which the defendants have intentionally suppressed, and were the result of a measurement to which the present defendants or their predecessor-in-interest were parties. If the areas had been put down by report as is urged by the defendants, one would have expected to find them in round numbers and not in scrupulously accurate and exact quantities running to karas and krantis."

In that way he arrives at the conclusion that the rent had originally been assessed on a basis of measurement and finds in effect that, whichever of the above two methods be adopted the present area

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of the holdings is in excess of the area for which rent had been previously paid. His own words are :—

“There is no dispute as to the standard of measurement and the increase in the areas [as ascertained by a commissioner who made a local enquiry] must be due to the gradual encroachment on the jungle and waste lands of the mehal *or to erroneous or fraudulent measurement on the previous occasion.*” [The italics are mine].

There is no doubt a distinction, however difficult it may be to define, between inference and speculation, but I cannot see that the Subordinate Judge in coming to that finding exceeded the bounds of legitimate inference from the facts and circumstances disclosed on the record. If I am correct in that view, the finding is conclusive in second appeal.

Objection is next taken to a subsequent passage in the judgment, which shows, it is argued, that the Subordinate Judge erroneously placed the burden of proof on the tenants. The passage runs :—

“The existence of excess area is a proved fact and it is not for the landlord to explain how it came about and this increase may be due to many events such as encroachment on the adjoining waste or khas land etc. Unless it is established by very satisfactory and reliable evidence that the rent was a consolidated one for an area within specified boundaries, irrespective of its precise quantity, the landlord is entitled to claim additional rent for the excess lands.”

What the learned Subordinate Judge means is that the proof by the landlord of the existence of ‘excess area’ shifted the burden and raised a case which the tenants had to meet. He was merely following the decision of this Court in the case already cited of *Lukhi Narain v. Sri Ram* (1). Though he does not expressly refer to the case, his language clearly shows that he had it before him. If, therefore, the finding as to excess area be accepted, there is no substance in the objection that the Subordinate Judge misplaced the burden of proof.

Then remains only one point. It is said that these are old tenancies and that the tenants represented that they had been holding the same land at the same rent for about one hundred years. It is suggested that the Subordinate Judge took no account of the age of the tenancies and thereby failed to carry out the direction given to him by clause 2(c). But the mere fact that he does not refer to the point in his judgment does not show that he did not consider it. He traced the tenancies to the chitta of 1227 and

(1) (1911) 15 C. W. N. 921.

other parts of his judgment show that the provisions of section 52 as a whole were present to his mind.

On the whole I am of opinion that though the case may be near the border line no sufficient ground is shown for our interference in second appeal and that this and the analogous appeals should be dismissed—as to costs, in the circumstances we propose to make no order as to the costs of this appeal.

Walmsley, J.—I agree that these appeals must be dismissed, but I do so with considerable reluctance. The reasons given by the lower appellate Court for believing that the holdings were measured in 122 B. S. are not at all convincing, and there are other difficulties which he has dealt with very lightly. We cannot however go behind his findings in this case, because it is impossible to say that there is no evidence to warrant them.

A. T. M.

Appeal dismissed.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Walmsley.

JADU NATH MANNA AND OTHERS

v.

PRAN KRISHNA DAS AND ANOTHER.*

Jurisdiction—Bengal Tenancy Act (VIII of 1885), Sec. 40, Sub-sec. (3)—Civil Court, if competent to examine the propriety of an order—Application, who should determine—Transfer, if valid.

A Civil Court is not competent to examine the propriety of an order of commutation made with jurisdiction; in other words, a Civil Court cannot determine whether, in the circumstances of a particular case, commutation was or was not properly directed; or whether the amount assessed as cash rent is or is not adequate: *Lalla Saligram v. Mokunt Ramgir* (1) followed. But if a question of jurisdiction arises, it is incumbent upon the Civil Court to satisfy itself that the order is made with jurisdiction; for an order made without jurisdiction, is a nullity and does not affect the rights and obligations of the parties: *Kali Krishna v. Ram* (2) referred to.

* Appeal from Appellate Decree No. 83 of 1915, against the decision of C. Bartley, Esq., District Judge of Midnapore, dated the 2nd September, 1914, affirming that of Babu Nitai Charan Ghose, Munsiff of Tumlook, dated the 6th August, 1913.

(1) (1897) 3 C. W. N. 311.

(2) (1915) 21 C. L. J. 487.

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An application to have the rent commuted to money rent should be entertained and determined on the merits by the officer to whom it was presented by the applicant. The 'officer' mentioned in sub-section 3 of section 40 of the Bengal Tenancy Act is the officer who received the application from the applicant. Consequently the Sub-Divisional officer cannot transfer an application received by him to a Settlement officer.

Appeal by the Plaintiffs.

Suit for arrears of rent.

The material facts and arguments are set forth in the judgment.

Babus Dwarka Nath Chuckerbutty, Manmatha Nath Ray and Sarada Charan Maity for the Appellants.

Babus Mahendra Nath Ray and Mahes Chunder Banerjee (for *Babu Jyotis Chuuder Hazra*) for the Respondents.

The judgment of the Court was delivered by

May, 24.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for arrears of rent. The plaintiffs allege that the rent is payable in kind, and claim to recover the price of the produce which has not been duly delivered. The defendants contend that the rent was commuted under section 40 of the Bengal Tenancy Act by an Assistant Settlement Officer on the 12th May 1908 and that they are consequently liable to pay cash rent at the rate then determined. Thus, the question in controversy between the parties is, whether the order under section 40 was made with jurisdiction. The Courts below have held that it was beyond the competence of the civil Court to examine this point. In our opinion this view cannot possibly be sustained.

The civil Court, it is well-settled, is not competent to examine the propriety of an order of commutation made with jurisdiction under section 40, in other words, the civil Court cannot determine whether, in the circumstances of the particular case, commutation was or was not properly directed; or, whether the amount assessed as cash rent is or is not adequate. *Lalla Saligram Singh v. Mohunt Ramgir* (1). But it is equally clear that if a question of jurisdiction arises, it is incumbent upon the civil Court to satisfy itself that the order is made with jurisdiction; for an order made without jurisdiction, is a nullity and does not affect the rights and obligations of the parties. In support of this proposition, reference may be made to the decision in *Kali Krishna Biswas v. Ram Chandra Baidya* (2). We must accordingly consider whether the order under section 40 was made with jurisdiction by the Assistant Settlement Officer.

(1) (1897) 3 C. W. N. 311. (2) (1915) 21 C. L. J. 487; 19 C. W. N. 823.

On the 7th February, 1906, the tenant applied to the Subdivisional Officer for commutation of his rent under section 40. The Subdivisional Officer was undoubtedly competent to entertain the application and to decide the case on the merits. This is clear from sub-section 2 of section 40 as it stood at the time when the application was made. The sub-section ran in these terms: "An application," that is, the application to have the rent commuted to a money rent, "may be made to the Collector or Subdivisional Officer or to an officer making a settlement of rents under chapter X, or to any other officer specially authorised in this behalf by the Local Government." The Subdivisional Officer, subsequently, transferred the application to the Settlement Officer, that is, the officer making settlements of rent under chapter X. On the 14th December, 1907, the Settlement Officer, to whom the application had been transferred, proceeded to transfer it to the Assistant Settlement Officer. The Assistant Settlement Officer heard the application on the merits and made an order for commutation. The question arises, whether the Subdivisional Officer was competent to transfer the application to the Settlement Officer. If this is answered in the negative, it becomes unnecessary to consider whether the Settlement Officer was in his turn competent to transfer the application to the Assistant Settlement Officer. Upon a plain reading of sub-sections 1, 2 and 3 of section 40, there is no room for doubt, that the Legislature contemplated that the application should be entertained and determined on the merits by the officer to whom it was presented by the applicant. Sub-section (1) contemplates an application for commutation of produce rent into money rent by either the raiyat or his landlord. Sub-section (2) specifies the classes of officers to whom an application of this character may be made. Sub-section 3, then lays down that "on receipt of the application, the officer may determine the sum to be paid as money-rent and may order that the raiyat shall, in lieu of paying his rent in kind, or otherwise as aforesaid, pay the sum so determined." It is clear that "the officer" mentioned in sub-section 3 is the officer who received the application from the applicant. It has been contended on behalf of the respondent that the power to transfer a judicial proceeding may be assumed to be inherent in the officer to whom the application has been presented, but no principle or authority has been invoked in support of this view. We hold accordingly that the Sub-divisional Officer was not competent to transfer the application to the Settlement Officer. In this view it is needless to consider whether it was competent to the Local Government to frame a rule under section 189, which authorises an officer of one of the four

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classes mentioned in sub-section 2 of section 40 to transfer the application he has received to an officer of another class specified in the section; nor is it necessary for us to determine whether this right of transfer can be claimed in succession by all officers of the class mentioned in that sub-section. Our attention has not been drawn to any rule which authorises a Sub-divisional Officer to transfer an application received by him to a Settlement Officer. There is thus no escape from the conclusion that the order of the Assistant Settlement Officer was made without jurisdiction.

The result is, that this appeal is allowed, the decree of the Court of appeal below set aside and the case remitted to the Court of first instance for determination of the amount payable by the defendants to the plaintiffs in respect of the years in suit. Each party will pay his own costs in this Court as also in the lower appellate Court.

A. T. M.

Appeal decreed: case remanded.

Before Mr. Justice Richardson and Mr. Justice Walmesley.

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KHITISH CHANDRA BANERJEE AND OTHERS

v.

THAKOMANI DEBI AND ANOTHER.*

Suit, if lies—Civil Procedure Code (Act V. of 1908), Sec. 47—'Party'—'Representative.'

If the property claimed by A in his personal capacity was sold, in execution of a decree passed in a suit in which he was sued in a representative character, as the property of B, it was open to A to apply under section 47 of the Code of Civil Procedure to have the sale set aside. A separate suit was not maintainable.

Funchanun v. Rabia Bibi (1) followed.

Appeal by the Defendants.

Suit to recover a share of certain tank.

The material facts are set forth in the judgment.

* Appeal from Appellate Decree No. 711 of 1916, against the decree of C. Tindall Esq., District Judge of Bankura, dated the 21st December, 1915, reversing that of Babu Surendra Chandra Bose, Officiating Munsiff of Bishunpur, dated the 18th August, 1914.

(1) (1890) L. L. R. 17 Cal. 711.

Babus Mahendra Nath Ray and *Surendra Nath Ghosal* for the Appellants.

Babus Mohini Mohan Chatterjee and *Krishna Lal Banerjee* for the Respondents.

The judgments of the Court were as follows :

Richardson, J.—The plaintiffs in this suit are Thakomani Debi, the widow, and Umamoyee Debi, the daughter of Durgadas Chatterjee deceased. They seek to recover a six-annas share of a certain tank which originally belonged in its entirety to Durgadas. It appears that in the year 1886, Durgadas executed a deed of gift in respect of a three annas share of the tank in favour of the plaintiff Umamoyee and another daughter since deceased. In the year 1890, Durgadas again executed a deed of gift of another three-annas share of the tank in favour of Thakomani. In the same year 1890 he died leaving a will by which he appointed his son Annoda his executor. On the 15th October, 1892, Annoda, as executor, mortgaged certain properties, not including the tank, in favour of the father of the defendants. In 1899, the father of the defendants obtained a decree on the mortgage in a suit to which Annoda in his capacity as executor and Thakomani were made parties. In execution of that decree the mortgaged properties were sold but as the proceeds proved insufficient to satisfy the amount due on the mortgage, further proceedings were taken under section 90 of the Transfer of Property Act. In those proceedings on the 21st February, 1902, the whole of the tank to which the suit relates was sold and purchased by the decree-holder, the father of the defendants. On the 30th May, 1902 the decree-holder obtained possession through the Court.

The case made for the plaintiffs is that Thakomani is entitled to a $4\frac{1}{2}$ annas share of the tank under the deed of gift in her favour and as heir of her deceased daughter who took a one and a half anna share under the other deed of gift, and that under the latter deed, the daughter Umamoyee is entitled to a one and a half anna share. The Courts below have held that the daughter has proved her right to the $1\frac{1}{2}$ annas share and the decrees are in her favour to that extent. There is now no further dispute as regards the daughter's claim, though the appeal before us seems to relate to the whole of the six annas. It must now therefore be formally dismissed so far as the $1\frac{1}{2}$ annas share belonging to Umamoyee is concerned.

As to the $4\frac{1}{2}$ annas share which the widow claims, both the Courts below have found that the deeds of gift represent genuine

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transactions and that the widow has established her title to this share. The first Court however found that the suit was not commenced within the period of limitation prescribed and dismissed this part of the claim. On that point, the learned District Judge has taken a different view. He has held that the widow is entitled to recover the $4\frac{1}{2}$ annas share. From that decision the defendants have appealed.

The whole question is whether having regard to the provisions of section 244 of the Code of 1882 corresponding to section 47 of the present Code, the widow was entitled to bring a separate suit to enforce her claim. If she was not so entitled, the present suit may be treated as an application under section 47 but if so treated, it would be barred by limitation under article 181 of the schedule of the Limitation Act.

It is not disputed for the widow that she was a party to the mortgage suit and that the decree in that suit was made against her as well as against Annoda as executor. The operative part of the decree runs as follows: "The defendants are to pay the same [*i.e.* the decretal amount] within six months from this date failing which the share in Taluk Birchandpore to the extent of 6 annas 13 gundas 1 kora 1 krant will be sold at auction to recover the same and in case the sale proceeds are insufficient, the remaining properties as belonging to the estate of the deceased Durgadas Chatterjee will have to be sold as being made liable to recover the balance." It may be conceded that the widow was on the record as a representative (in addition to the executor) of the estate of the deceased, Durgadas Chatterjee. When the proceeds of the mortgaged properties proved to be insufficient to satisfy the decree, the decree-holder made an application for a further decree under section 90, Transfer of Property Act. That application was rejected on the ground that the decree in the mortgage suit which I have read already included a decree under section 90 of the Transfer of Property Act. The order of rejecting the application, dated the 5th June, 1901, continues as follows: "The decree-holder further prays for a personal decree against the defendants but they not being mortgagors cannot be personally liable and no personal decree was prayed for in the plaint. In the plaint a decree under section 90 Transfer of Property Act against the estate of the deceased mortgagor was prayed and such a decree has been granted. So the petitioners' prayer be disallowed."

In the lower appellate Court the District Judge appears to have thought that the effect of that order was to dismiss the suit or the

claim under section 90 as against the widow Thakomoni. On the authority, as he says of a long line of cases ending with the case of *Ram Pershad v Jagannath* (1), he held that under the Code of 1882 the claim under section 90 having been dismissed against Thakomoni, she ceased to be a party to the suit within the meaning of section 244, Code of Civil Procedure and was therefore not in a position to come in under that section in the execution department and object to the sale of the whole tank including her share.

In my opinion, the learned District Judge has misunderstood the effect of the order of the 5th June, 1901. The original decree which included a decree under section 90 remained. There was no dismissal of the claim under section 90 against Thakomoni. Thakomoni continued to be a party defendant on the record, though it may be that she was not on the record in her own right but as representative of the deceased Durga Das. The sale therefore of the whole tank must be held to have taken place in execution of a decree to which Thakomoni was a party, though in a representative capacity. If that be so, the decision of the Full Bench in the case of *Punchanun Bandopadhyaya v. Rabia Bibi* (2), shows that if the property claimed by Thakomoni in her personal capacity was sold in execution as the property appertaining to the estate of Durga Das, it was open to Thakomoni to apply under section 244 to have the sale set aside so far as it related to the share of the tank to which she was personally entitled. If it was open to her so to apply, a separate suit by her was prohibited by section 244 of the code of 1882 and is now prohibited by section 47 of the present code. It is not disputed that if this suit can only be maintained if regarded as an application under section 47 of the present code, it is out of time. The view which I have expressed is the view adopted by the learned Munsiff in the trial court and seems to me to be the right view on the facts as they appear on the record.

In my opinion therefore, the appeal in so far as it relates to the $4\frac{1}{2}$ annas share of the tank claimed by Thakomani must be allowed and in so far as it relates to the $1\frac{1}{2}$ as. share of the tank claimed by Umamoyee dismissed. In the circumstances of this case each party will bear their own costs throughout.

Walmsley, J.—I agree.

A. T. M.

Appeal decreed in part.

(1) (1902) I. L. R. 30 Calc. 134.

(2) (1890) I. L. R. 17 Cal. 711.

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Before Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

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UDIT NARAYAN JHA

v.

MUSAMMAT JASODA SAHUN KALAN AND OTHERS.*

Mortgage decree—Mortgage executed by widow and next reversioner—Decree against both—Execution, application for, against both—Objection as to interest after period of grace by widow—Widow, death of, pending execution—Next reversioner, if can raise same objection subsequently—Decree absolute—Further interest.

A, a Hindu widow in possession of her husband's estate and B, the next reversioner, jointly executed a mortgage bond on which the creditor obtained a decree against both and executed the same against both, claiming interest at the bond rate until actual payment. A alone made an objection as regards interest subsequent to the period of grace but her objection was disallowed. Pending execution A died and B was substituted in her place. B then filed a fresh objection on the ground that the decree-holder was not entitled to interest after the period of grace under the terms of the decree. About the same time he filed an application for the amendment of the decree on the ground that it was not in accordance with the judgment :

Held, that B was entitled to defend his newly acquired title by all means accessible to his new character.

The proper period for allowing further interest after the period of grace, would be when the decree absolute is made. If the decree absolute does not contain any mention of interest it should be considered as disallowed.

Appeal by the judgment-debtor.

Application for execution.

The material facts and arguments appear from the judgment.

Babus Ram Chunder Mozumdar and *Uma Charan Laha* for the Appellant.

Babus Mahendra Nath Roy and *Gurudas Sinha* for the Respondent.

C. A. V.

The judgments of the Court were as follows :

August, 20.

D. Chatterjee, J.—Mussumat Nainabaty, a Hindu widow in possession of the estate of her husband, and the next reversioner who is the appellant before us, jointly executed a mortgage-bond on which the creditor obtained a decree against both and executed the same against both claiming interest at the bond rate until actual

* Appeal from order No 204 of 1914 with Rule No. 522 of 1914, against the order of Babu Satis Chandra Mitra, Officiating Subordinate Judge of 1st Court at Bhagalpur, dated the 5th March, 1914.

payment. Nainabaty alone made an objection as regards interest subsequent to the period of grace but her objection was disallowed and an appeal to the High Court was filed but withdrawn. The two judgment-debtors then jointly sold a part of the mortgaged property by private sale under the sanction of the Court and satisfied a part of the decree. The decree was then sold to the respondent who applied for execution claiming interest at the same rate as the original decree-holder: pending execution Nainabaty died and the appellant was substituted in her place: as he was already a judgment-debtor on the record as a reversioner this order of substitution must mean that he then became a judgment-debtor in his own right as full owner. He now filed a fresh objection on the ground that the decree-holder was not entitled to interest after the period of grace under the terms of the decree: about the same time he filed an application for the amendment of the decree on the ground that it was not in accordance with the judgment. These two proceedings were run as alternative proceedings so that if the one failed the other might be fought out. Both the applications were rejected and we have before us the Misc. Appeal in the objection case under section 47 and the Rule in the amendment case.

The first question that suggests itself on the facts stated is one of the competency of the present proceedings. The appellant Udit Narain was a party to the decree and a party to the execution: can he re-open matters settled by orders made prior to the death of Nainabaty? I think there is a fallacy involved in the question. The Udit Narain that was a party before the death of the widow in possession was merely the presumptive reversioner Udit who had no present interest in the property in dispute, who had a mere contingent interest a mere *spes successionis* which he could not dispose of: his right was contingent on his surviving the widow and might never come into being. The Udit Narain who has initiated these proceedings is the present heir of the last male owner and is fully clothed with all the rights of a proprietor. The identity is only in the name and not in the title or the character; so far as these are concerned he is quite a different man. I think he is entitled to defend his newly acquired title by all means accessible to his new character. Coming to the merits, I find that the ordering portion of the judgment was. "The principal amount is to bear interest at the rate stipulated in the bond and the cost to bear interest at 6 per cent per annum, should the defendant 1st party make default to pay the decretal amount within 6 months from this date it shall be realised by the sale of the mortgaged properties."

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The decree gives the (1) principal with interest at the bond rate up to date of suit, (2) interest at the bond rate from date of suit to the date of realization, (3) interest on the interest at 6 per cent per annum from date of suit to date of realization (4) interest on costs at 6 per cent per annum from date of decree to date of realization, (5) costs and then orders that if they fail to pay the whole of the decretal amount within the period fixed by the Court (6 months) the decretal amount would be realized by the sale of the mortgaged properties.

Under the provisions of sections 86 and 88 of the Transfer of Property Act as interpreted by their Lordships of the Privy Council in the case of *Sundar Koer v. Rai Sham Krishen* (1). "A general account shall be taken once for all and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and after the expiration of that day if the property should not be redeemed the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should thenceforth depend not on the contents of his bond but on the directions in the decree." Section 209 of the old Civil Procedure Code which applies to the present decree provided that when the Court gives a decree for money it can direct, in addition to the principal sum with interest up to date of suit, the payment of interest on the principal at a reasonable rate from date of suit to date of decree and further interest from date of decree to date of payment. If no such interest is expressly given it is to be considered as refused.

Now if sections 86 and 88 of the Transfer of Property Act include the whole period up to the expiration of the period of grace the jurisdiction to grant further interest must be under section 209 of the Civil Procedure Code : for it is after that period that the matter passes from the domain of contract to the domain of judgment.

In the present case there is no indication of any interest being decreed subsequent to the period of grace : all the five items of the decree including the costs form the decretal amount the failure to pay which would make the amount realizable by sale. This is the preliminary decree and until the 6 months expired there was no knowing whether any further interest would be payable. It seems that the proper period for allowing further interest would be when the decree absolute is made. The decree absolute or rather order absolute in this case does not provide for any such interest and I think no such interest was given by the decree. It is contended that the words in the original *ta-raz-wosool* used in contradistinction

(1) (1906) I. L. R. 34 Calc. 150 ; C. L. J. 106.

from the words *adai* show that the decree meant to make a distinction between the date fixed for payment and the date of actual realization. I think this argument is not sound. The words *wosool* and *adai* are relative terms. The creditor makes *wosool* or realization when the debtor makes *adai* or payment. So that the decree as made seems to speak of the same point of time by the words *wosool* and *adai* and is to my mind one in accordance with the judgment. It is true that it allows interest on interest at 6 per cent. per annum from date of suit to date of realization but that has been accepted. In this view of the matter, I think that the Rule should be discharged and the appeal decreed. The interest will be calculated up to the end of the period of grace and if on that calculation anything is found due to the decree-holder execution will go on for the same. If the whole amount due should be found to have been satisfied before the present objection the execution case will be dismissed. The appellant is entitled to his costs which we fix at 3 gold mohurs.

Walmsley, J.—I agree.

A. T. M.

Appeal allowed: Rule discharged.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Richardson.

MEHER ALI AND ANOTHER

v.

KALAI KHALASI.*

Ejectment—Under-raiyat—Interest; if heritable—‘Kayemi’—‘Sthayee Karsha’—Decree; form of—Raiyat at fixed rate, if can create permanent heritable interest.

The interest of an under-raiyat is not heritable.

Arip v. Ram Ratan (1), and *Jamini Sundari v. Rajendra Nath* (2) followed.

* Appeal from Appellate Decree No. 2929 of 1913, against the decree of G. B. Mumford Esq., District Judge of Faridpur, dated the 7th June, 1911, affirming that of Pabu Piseswar Mojumdar, Munsiff of Medanipur, dated the 29th May, 1912.

(1) (1904) I. L. R. 31-Calcutta, 757 F. B. ; 8 C. W. N. 479 F. B.

(2) (1906) 11 C. W. N. 579.

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Jasda Sahun.

D. Chatterjee, J.

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Where a suit was instituted before the expiry of the agricultural year current at the time when the original under-raiyat dies, the proper form of the decree would be one for ejectment against his representatives, to be executed only on the expiry of that particular agricultural year.

An occupancy raiyat is not competent to create a permanent heritable under-raiyati interest.

The use of the word '*Kayemi*' imports not fixity of rent, but only permanence of occupation of the land.

A description of the *Kabuliati* as '*Sthayee Karsha*' kabuliati does not necessarily imply that the grantee was intended to have a permanent heritable interest.

Obiter. A raiyat holding at a fixed rate of rent is competent to create a permanent heritable interest in favour of his grantee, although the latter was an under-raiyat.

Hari Mohan v. Atul Krishna (3) referred to.

Appeal by the Defendants.

Suit for ejectment

In the *kabuliati* executed by the ancestor of the defendants in favour of the plaintiff, the interest of the latter was described as a *kayemi karsha* jote. The kabuliati was described as *sthyee karsha kabala*. The original tenant died in 1910 and on the 4th April the plaintiff instituted a suit to eject the defendants who were his descendants on the ground that as the leasehold interest was not heritable, they had no right to remain in occupation of the land. The Courts below decreed the suit.

Babu Surendra Chunder Sen for the Appellants.

Babu Rupendra Kumar Mitter for the Respondent.

The judgment of the Court was delivered by

March, 23.

Mookerjee, J.—This is an appeal by the defendants in an action is ejectment. The ancestor of the defendants executed a kabulyat in favour of the plaintiff on the 1st June, 1889 in respect of the disputed land which covers an area of 'six' cottahs. The original tenant died in 1910. On the 4th April, 1911, the plaintiff commenced this action to eject the defendants who are his descendants on the ground that as the leasehold interest was not heritable, they had no right to remain in occupation of the land. The Courts below have decreed the suit. In support of the present appeal, it has been urged that the plaintiff was a raiyat at a fixed rate of rent and was competent to create as he did a permanent heritable interest in favour of his grantee, although the latter was an under-

(3) (1913) Unreported. Civil Rule No. 1260 of 1913, decided on the 17th June, 1913.

raiyat. It has not been disputed by the respondent and in view of the decision in *Hari Mohon v. Atul Krishna* (1), it cannot be disputed that this result would follow if the plaintiff is a raiyat at a fixed rate; but it has been argued that he is not a raiyat of that description. ¶

In the kabulyat executed by the ancestor of the defendants in favour of the plaintiff, the interest of the latter is described as *kayemi karsha jote*. The contention of the appellant is that the use of the term *kayemi* indicates that the plaintiff was a raiyat at a fixed rent. This position has been controverted by the respondent, and reliance has been placed on the decision in *Fazel Sheikh v. Keramuddi Sheikh* (2), to show that the term '*kayemi*' does not necessarily indicate fixity of rent. Reference has also been made to paragraph 15 of the Report of the Rent Law Commission, dated the 15th July, 1880, published in the Calcutta Gazette of the 21st July, 1880. The opinion was expressed by the Commission, as the result of their enquiries, that in Backergunj even the interest of a howladar is not held at a fixed rent; and this, indeed, was the view adopted by this Court in the case of *Haromohun Mookerjee v. Ranee Lalun Monee Dasee* (3). If the interest of a howladar does not imply fixity of rent, it is obvious that a subordinate tenant, whose interest is that of a *kayemi karshadar* does not hold at a fixed rent. We are of opinion that the use of the term '*kayemi*' imports, not fixity of rent, but only permanence of occupation of the land, and this view is in accord with that adopted in *Gayratulla v. Girish* (4), and *Fazel v. Keramuddi* (2). The position then, is that the plaintiff was an occupancy raiyat, and was not competent to create in favour of the ancestor of the defendants, a permanent heritable under-raiyati interest.

It has been finally argued on behalf of the appellant that as the kabulyat is described as *Sihayee Karsha Kabulyat*, the intention of the grantor, whatever restrictions then might have been on his own rights, was to create a permanent and heritable interest in the grantee, and, that, notwithstanding the provisions of section 85 of the Bengal Tenancy Act, it is not open to him to question the validity of the grant made by him. In our opinion, there is no force in this contention for the description of the Kabulyat as "*Sihayee Karsha*" Kabulyat does not necessarily imply that the grantee was intended to have a permanent heritable interest. We must take that expres-

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(1) (1913) Unreported. Rule No. 1260 of 1913; 23 I. C. 325.

(2) (1902) 6 C. W. N. 916.

(3) (1864) 1 W. R. 5.

(4) (1907) 12 C. W. N. 175.

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sion along with the description of the interest of the grantor himself, who was only an occupancy raiyat, and not a raiyat, at a fixed rent; he could not consequently be assumed to have created in the grantee a permanent heritable interest in contravention of the express provisions of the law. In this view, no question of estoppel arises.

If, then, the grantee was an under-raiyat, as he must be held to have been, it cannot be disputed that his interest was not heritable. This view is supported by the cases of *Arip Mandal v. Ram Ratan Mandal* (1), and *Jamini Sundari Dasi v. Rajendra Nath Chukrabutty* (2). With reference, however, to the decision of the Full Bench in *Arip Mandal v. Ram Ratan Mandal* (1), it has been argued that as the present suit was instituted before the expiry of the agricultural year in which the tenant died, the suit was premature and was bound to fail. We are not prepared to accept this contention as well-founded. Assuming that the suit was instituted before the expiry of the agricultural year current at the time when the original under-ryot died, the proper form of the decree would be one for ejectment against his representatives, the defendants, to be executed only on the expiry of that particular agricultural year. It is not disputed that the agricultural year mentioned has expired long ago and that the defendants have nevertheless continued in occupation of the land. The decree, for ejectment made by the Court below must consequently be affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1904) I. L. R. 31 Calc. 757; 8 C. W. N. 479.

(2) (1906) 11 C. W. N. 519

Before Mr. Justice N. R. Chatterjea and Mr. Justice Greaves.

MAHABIR MISSER AND OTHERS

v.

NANDA KISSORE MISSER AND OTHERS.*

CIVIL.

1915.

January, 5.

1914.

December 17.

Res-judicata—Compromise decree—Compromise relating to extraneous matter—Extraneous matter embodied in decree—Petition containing argument, not registered, if admissible in evidence—Adverse possession—Waste land—Tethering and throwing Cow-dung.

A previous suit between the parties about a piece of land (three cottahs in area) ended in a compromise. The terms of the compromise were set out in a petition which after stating that each party will remain in possession of one half of the three cottahs in dispute in that suit, ran as follows: "Be it noted that the *Brit* lands shall remain in possession of each of the parties in the same way as they stand entered in the survey khatian..... A decree may be passed in this suit in favour of the plaintiff in respect of 1 cottah 10 dhurs of land as per (following) boundaries." The whole of the petition of compromise including the above was recited in the decree and the order was "It is ordered that the suit be decreed as per terms of the petition of compromise." In a subsequent suit for recovery of possession of waste land which was recorded as plaintiff's *Brit* land in the record of rights:

Held, that the previous suit did not operate as *Res judicata*, even though the argument about the *Brit* lands formed the consideration for the compromise.

Held also, that the agreement recorded in the decree, though not registered was admissible in evidence.

Pranal Anni v. Lakshmi Anni (1) referred to †

A decree recording an argument as one of the terms of the compromise though not relating to the suit, is a legal record of the agreement between the parties and as such available to the party as evidence.

Acts, such as tethering of cattle and throwing cow-dungs on the land, if unaccompanied with the assertion of any adverse right, would not necessarily denote that a claim of ownership to the land was thereby asserted.

* Appeal from Appellate Decree No. 2181 of 1913, against the decree of Babu Hridoya Nath Mozumdar, Subordinate Judge, 2nd Court of Mozufferpur, dated the 19th May, 1913, reversing that of Moulvi Abdur Rahim, Munsiff of Motihari dated the 9th October, 1912.

(1) (1899) I. L. R. 22 Mad. 508 (514).

† See also *Bindsri Nath v. Ganga Saran* (1897) I. L. R. 20 All. 171 (180), *Gupta v. Bijoya* (1897) 2 C. W. N. 663, *Raghubans Mani Singh v. Mahabir Singh* (1905) I. L. R. 28 All. 78, *Patha Muthammal v. Esup Rowther* (1906) I. L. R. 29 Mad. 365, *Gobinda v. Dwarka* (1908) 7 C. L. J. 492, I. L. R. 35 Calc. 837 and *Panchanon v. Chandi* (1910) 14 C. W. N. 874 (878), I. L. R. 37 Calc. 808. For a contrary decision, see *Birbhadra v. Kalpataru* (1905) 1 C. L. J. 388 and *Gurdeo Singh v. Chandrikah Singh* (1907) 5 C. L. J. 611 (636), I. L. R. 36 Calc. 193—Rep.)

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Radhamoni v. Collector of Khulna (1) referred to.

Appeal by the Plaintiffs.

Suit for revocery of possession of land.

The material facts and arguments appear from the judgment.

Babu Sib Chandra Palit for the Appellants.

No one appeared for the Respondents.

C. A. V.

The judgment of the Court was as follows :

January, 5.

Two questions have been raised in this appeal. The first is, whether a certain compromise decree in a previous suit between the parties, operates as *Res judicata* or at any rate, is evidence of an agreement between the parties with reference to the land in suit, and the second, whether the suit is barred by limitation.

The present suit is for recovery of possession of 2 cottas and odd of *Parti* (waste) land which was recorded as plaintiffs' *Brit* (rent free) land in the record of rights. The Court of first instance decreed the suit, but the lower appellate Court reversed that decree, and the plaintiffs have appealed to this Court.

It appears that there was a previous suit between the parties, about another piece of land (3 cottas in area) which ended in a compromise. The terms of the compromise were set out in a petition which after stating that each party will remain in possession of one half of the 3 cottas in dispute in that suit, ran as follows. "Be it noted that the *Brit* lands shall remain in possession of each of the parties in the same way as they stand entered in the survey khatian A decree may be passed in this suit in favour of the plaintiffs in respect of 1 cotta 10 dhooors of land as per (following) boundaries." The whole of the petition of compromise including the above was recited in the decree and the order was "It is ordered that the suit be decreed as per terms of the petition of compromise."

The learned Subordinate Judge was of opinion that the recital about the *Brit* lands, did not appear to be an agreement, but a "mere notice of the intention of the parties," and that the recital was too vague to refer to plot No. 845 (the plot to which the land in suit is alleged to appertain). But plot No. 845 is one of the *Brit* plots entered in the Survey Khatian and we are of opinion that the clause "the *Brit* lands shall remain in possession of each of the parties in the same way as they stand entered in the survey khatian" amounted to an agreement between the parties, and an agreement

about all the *Brit* lands entered in the survey khatian, including plot No. 845 which was one of the plots entered therein. The learned Subordinate Judge was further of opinion that even if it was an agreement, it was outside the scope of the suit, and being unregistered was inadmissible in evidence. It is contended on behalf of the appellant that the compromise decree operates as *Res judicata* and at any rate is evidence of the agreement.

We are of opinion that it does not operate as *Res judicata*. Order 23 rule 3 provides that when a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded, and shall pass a decree in accordance therewith, so far as it relates to the suit.

It is true all the terms of the compromise were recited in the decree, but the compromise, in so far as it related to the suit, was with respect to the three cottahs (the subject matter in dispute in that suit), and the court was expressly asked to pass a decree in the suit in favour of the plaintiff in respect of 1 cotta 10 dhoors of land, being a moiety of the land in suit, and the order of the Court that the suit be decreed as per terms of the petition of compromise evidently had reference to the prayer made in the petition, *vis*, that a decree might be passed with respect to one half of the land in suit.

It is contended however that the agreement about the *Brit* lands formed the consideration for the compromise, and that therefore the decree operated as *Res judicata* with regard to it also. But even if it did form consideration for the compromise, the Court was never asked to pass a decree with respect to any matter other than the land in dispute in that suit. There was no decree as regards the *Brit* lands, and the decree cannot therefore operate as *Res judicata*, with regard to the *Brit* lands. In this view it is unnecessary to consider the authorities upon the question whether a compromise decree can operate as *Res judicata* upon any matter other than that relating to the suit, upon which there is some conflict of judicial opinion.

But although the decree does not operate as *Res judicata*, we think the agreement recited in the decree is admissible in evidence, though not registered. In the case of *Pranal Anni v. Lakshmi Anni* (1), the Judicial Committee of the Privy Council observed as follows—"If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in the suit, and also a half share of the lands now in dis-

(1) (1899) I. L. R. 22 Mad. 508 (514.)

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pute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that that order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute." In that case although the Razinamah which was submitted to the Court referred by way of remark to the arrangement arrived at, between the parties with respect to the lands not forming the subject matter of the suit, the Court in its order referred only to the lands in dispute in that suit.

In the present case the decree states "on perusing the petition of compromise to the effect" and then recites all the terms of the compromise including those relating to the *Brit* lands. The order of the Court *vis*, that the suit "be decreed as per terms of the petition of compromise" must be taken to *refer* to all the terms, including those relating to the *Brit* lands, although it must *be* taken to *have given* effect to the terms of the compromise only in so far as they related to the suit, as the only decree which the Court was asked to pass was with respect to the lands in dispute in that suit. But all the terms including those relating to the *Brit* lands were submitted to the Court, and were perused by it, and the order of the Court must be taken to have *referred to* or *narrated* the agreement relating to the *Brit* lands. In any case the agreement relating to the *Brit* lands was recorded in the decree. Under Order 23, Rule 3 of the Code of Civil Procedure, the Court is to *record* the agreement of compromise, and to pass a decree in accordance therewith in so far as it relates to the suit. A decree therefore recording an agreement as one of the terms of the compromise though not relating to the suit is a legal record of the agreement between the parties and as such available to the appellant as evidence. We are accordingly of opinion that the agreement recited in the decree, does not require registration and is admissible in evidence. The learned Subordinate Judge should have therefore considered it as a piece of evidence in the case.

The second contention relates to the question of limitation. The learned Subordinate Judge has found that the lands were *parti* (waste.) That being so we do not appreciate what he means by saying "such being the character of the lands, the plaintiff could have shown that they exercised dominion over the lands in dispute before the Bhadon of 1318 F. S., when the defendants are said to

have got into them." The only acts of possession exercised by the defendants as found by the Subordinate Judge are "tethering of cattle, and throwing cow-dungs on the land." But such acts if unaccompanied with the assertion of any adverse right, would not necessarily depote that a claim of ownership to the land was thereby asserted, and as observed by the Judicial Committee in the case of *Radhamoni Debi v. The Collector of Khulna* (1), possession in order to be adverse must be adequate in continuity, in publicity, and in extent. The learned Subordinate Judge does not appear to have considered these matters in deciding the question of limitation.

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We are of opinion that the case should go back for a re-hearing of the appeal. The decree of the lower appellate Court is accordingly set aside and the case remanded to that Court for a re-hearing of the appeal in accordance with the above remarks. Costs to abide the result.

A. T. M.

Case remanded.

(1) (1900) I. L. R. 27 Cal. 943 (1950.)

Before Mr. Justice Richardson and Mr. Justice Walmsley.

RANI MINA KUMARI SAHEBA

v.

ICHAMOYEE CHOWDHURANI AND ANOTHER.*

CIVIL.

1918.

February, 21,
March, 13.

Occupancy holding—Non-transferable—Custom of transferability subject to payment of customary Nazar—Evidence—Nazar, amount of—Nazar determined by agreement—Transferee of holding, title of, when accrues.

In order to establish a custom of transferability subject to the payment of a customary *nazar*, the evidence must show that the landlord is bound to recognise the transfer when *nazar* of the amount, or at the rate, determined by custom is tendered to him. There is all the difference between a fixed *nazar*, which the landlord is obliged to accept whether he likes it or not and a *nazar* which is bargained for and paid as the price of a consent which he may give or withhold.

* Appeals from Appellate Decrees Nos. 2651, 2884 to 2897 of 1915, against the decision of J. Phillimore, Esq., District Judge of Birbhum, dated the 29th June, 1915, affirming that of Babu Nishi Kanta Banerjee, Munsiff of Additional Court at Rampurhat, dated the 18th March, 1914.

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as he pleases. A practice or course of business in a zemindary office according to which a transferee is recognised provided that the amount of the *nazar* is satisfactory to the landlord is not sufficient.

The payment of *nazar without more* is an indication that the jotes are not transferable without the landlord's consent given on receipt of the *nazar*.

A custom which leaves the amount or rate of *nazar* indefinite, is void for uncertainty. The position is not better than when the *nazar* is determined by agreement.

If there is a customary rate of *nazar* which the landlord is obliged to accept, the transferee of an occupancy holding has no title under the custom until he has paid or tendered *nazar* at that rate: *Sibo Sundari v. Raj Mohan* (1) and *Maharaja Radha Kishore v. Ananda Pria* (2) referred to.

Appeal by the Plaintiff.

Suit to recover possession of an occupancy holding.

The material facts and arguments appear from the judgment.

Babus Bepin Behary Ghose and *Urukramdas Chuckerbutty* for the Appellant.

Babus Ram Chunder Mozumder and *Gouranga Nath Banerjee* for the Respondents.

C. A. V.

The judgment of the Court was as follows :

S. A. 2651 of 1915:—The appellant is the plaintiff in a suit brought to recover actual possession of an occupancy holding in the village of Basanta of which he is the proprietor. His case is that the holding is non-transferable and that the defendants who are in possession as purchasers from the original tenant are mere trespassers. Of the defences raised we are now concerned only with the defence that occupancy holdings in the village are transferable by custom without the landlord's consent. The written statement says nothing about the payment of *nazar* customary or otherwise. There is no plea that *nazar* has in fact been paid. Nor is there any reference to *nazar* in the issue framed upon this question. The issue is merely "Are the disputed holdings transferable by local custom or usage?" At the trial, however, evidence relating to the payment of *nazar* has been given and both the Courts below have found in favour of a custom of transferability involving in some way, which is not clearly defined, the payment of *nazar*. The question is whether the finding can be supported in law.

The cases on the subject of customary *nazar* will be found collected in Mr. Sen's work on the Bengal Zemindary Act (3rd Edition, pages 136, 137). The principle of the cases is clearly this

(1) (1903) 8 C. W. N. 214.

(2) (1903) 8 C. W. N. 235.

that in order to establish a custom of transferability subject to the payment of a customary *nazar* the evidence must show that the landlord is bound to recognise the transfer when *nazar* of the amount, or at the rate, determined by custom is tendered to him. There is all the difference between a fixed *nazar*, which the landlord is obliged to accept whether he likes it or not and a *nazar* which is bargained for and paid as the price of a consent which he may give or withhold as he pleases. A practice or course of business in a zemindary office according to which a transferee is recognized provided that the amount of the *nazar* is satisfactory to the landlord is not sufficient.

Tried by this standard the finding of the learned Munsiff is not a good finding of a custom. It is not enough to say "that there are constant transfers and the transferees pay *nazar* to the landlord to be recognized." The two statements that "occupancy jotes are transferable" and that "landlords recognise such on payment of *nazar*" are as they stand inconsistent. The payment of *nazar without more* is an indication that the jotes are not transferable without the landlord's consent, given on receipt of the *nazar*.

The finding of the learned District Judge is more artificial but as it rests on the same materials it is perhaps not surprising to find that it is also open to objection. He holds "that a custom or usage existed in the plaintiff's estate at Basanta by which occupancy holdings are transferred with the knowledge but without the consent of the landlord and are recognized by the landlord upon payment of a *nazar* fixed by custom." It may be presumed that the Judge means that the transfers are or must be recognized by the landlord. Apart, however, from any question of grammar, the substantial objection to the finding is that it does not state the amount of the customary *nazar*. As to that there is no definite conclusion arrived at in the judgment. The Judge says that "the landlords recognize all transfers of occupancy holdings, provided a fixed *nazar*, generally four annas in the rupee on the purchase of the property is paid." But though he adds that "the *nazar* varies in different estates" he does not determine the rate payable in Basanta.

Now obviously a custom which leaves the amount or rate of *nazar* indefinite must be void for uncertainty. The position is no whit better than when the *nazar* is determined by agreement. No one knows what he has to pay and the landlord can demand what he pleases and refuse his consent unless he is satisfied.

Further there is another vice in the judgment. It is not found that the defendants paid or tendered any *nazar*. As I have said the

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written statement contains no such plea, and even if it be assumed that there is a customary rate of nazar which the landlord is obliged to accept the defendants have no title under the custom until they have paid or tendered nazar at that rate. [*Maharaja Radha Kishore Manikya v. Sreemutty Ananda Pria* (1), *Srimutty Sibb Sundari Ghose v. Raj Mohun Guha* (2)].

For these reasons, the judgments and decrees of the Courts below should, in my opinion, be set aside and a decree made in favour of the plaintiff awarding her khas possession in accordance with the first prayer of the plaint with costs throughout. There will be a remand of the suit to the Court of first instance in order that the claim for mesne profits may be tried.

This judgment governs the consolidated appeals other than Appeals 2892, 2893, 2894, 2895 and 2896, which fail on other grounds and are dismissed with costs.

I may add that we allowed the parties, at their request, time to settle the matter, but they have not found it possible to arrive at an agreement.

A. T. M. *Appeals Nos. 2651, 2884 to 2891 and 2897 decreed.*
Appeals Nos. 2892 to 2896 dismissed.

(1) (1903) 8 C. W. N. 235.

(2) (1903) 8 C. W. N. 214.

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Beachcroft.

PADE MAHOMED

v.

CHEETRA NATH CHOWDHRY AND OTHERS.*

Suit, trial of—Suit, institution of, in wrong court—Court, duty of—Court, if can try the suit on merits, instead of returning the plaint—Civil Procedure Code (Act V of 1908) O. 7 R. 10—Applicability to Provincial Small Cause Court.

A Small Cause Court Judge is bound to return a plaint for presentation to the Court in which the suit should have been instituted. After deciding that the

* Civil Rules Nos. 895 to 899 of 1916, against the decision of Babu Thakurdas Banerjee, Small Cause Court Judge of Bhakurgaon, dated the 3rd July, 1916.

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suit is not triable by him, he should not proceed to try the case on the merits: *Ladhaji v. Hari* (1) referred to.

Order 7, rule 10 of the Code of Civil Procedure applies to Provincial Small Cause Courts.

Application for revision by the Plaintiff, under section 25 of the Provincial Small Cause Courts Act.

Suit for rescission of a contract, and, in the alternative, for a declaration that the contract was either void or voidable and for consequential reliefs.

The material facts and arguments appear from the judgment.

Babus Sarat Chunder Roy Chowdhury and *Lal Mohan Ghose* for the Petitioner.

Babu D. N. Bagchi for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—(Rule 895 of 1916) We are invited in this Rule to set aside a decree of dismissal made by a Court of Small Causes. The suit was in essence for rescission of a contract, and, in the alternative, for declaration that the contract was either void or voidable and for consequential reliefs. Objection was taken by the defendants that the suit was excluded from the cognizance of a Court of Small Causes under clauses 16 and 19 of the second schedule to the Provincial Small Cause Courts Act. The defendants also objected to the claim on the merits. The Small Cause Court Judge found that the suit was not cognizable in his Court under clauses 16 and 19; but, notwithstanding this conclusion, he proceeded to try the case on the merits and ultimately dismissed it. The plaintiffs now contend that the only course open to the Judge was to direct that the plaint be returned to the plaintiff for presentation to the proper Court. This view has been controverted by the defendants. In our opinion the order made by the Small Cause Court Judge is obviously wrong.

Order 7, Rule 10 of the Code of 1908, which applies to Provincial Small Cause Courts as is clear from Order 50, provides that the plaint shall, at any stage of the suit, be returned to the plaintiff for presentation to the Court in which the suit should have been instituted. The words "at any stage of the suit" were introduced in the Code of 1908 and did not appear in the corresponding provision of the Code of 1882, namely section 57. These would really amount to a legislative approval of the decision of a Full Bench of the Bombay

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(1) (1899) 1 Bom. L. R. 176.

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High Court in the case of *Prabhakarbhut v. Vishwambhar* (1). Consequently, it was incumbent on the Small Cause Court Judge to return the plaint to the plaintiff for presentation to the proper Court. *Ladhaji v. Hari* (2). The Rule is accordingly made absolute, the order of the Small Cause Court Judge set aside. The plaint will be returned to the plaintiff in order that he may present it to the proper Court for trial of his claim. As the Rule has been opposed we make it absolute with costs which we assess at one gold mohur. We are of opinion that the Rule should not have been opposed, and, if it had not been opposed, we would not have been disposed to allow costs to the petitioner.

It is conceded that this judgment will govern the analogous Rules Nos. 896 to 899 (of 1916). These Rules also are made absolute with costs—one gold mohur in each case.

A. T. M.

Rules made absolute.

(1) (1884) I. L. R. 8 Bom. 313. (2) (1899) 1 Bom. L. R. 176.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Walmsley.*

CIVIL.

1917.

April, 25.

DHARANIDHAR ADITYA AND OTHERS

v.

HEMANGA CHANDRA JANA.*

Suit, trial of—ex parte decree, setting aside of, by another decree.

When a consent decree was set aside, the result was to relegate the parties to the position they previously occupied, with the result that the suit which had terminated in the consent decree had to be retried when the consent decree was vacated: *Khajoronissa v. Rowshan Jehan* (1) referred to.

Where a suit was terminated by an *ex parte* decree, which was set aside by a Court of competent jurisdiction:

Held, that the *ex parte* decree whereby the suit was terminated, stood cancelled and the suit remained on the file of the Court as an undisposed of suit and that the Court should proceed with the trial of the suit.

* Civil Rule No 7 of 1917, against an order of Babu Hem Chunder Bose, Munsiff of Midnapore, dated the 20th November, 1916.

(1) (1876) I. L. R. 2 Calc. 184.

Application for revision under section 115 of the Code of Civil Procedure by the Plaintiff.

• Suit for arrears of rent.

The material facts and arguments appear from the judgment.

Babu Debendra Nath Mandal for the Petitioners.

Babu Amarendra Nath Bose for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—We are invited in this Rule to consider the propriety of an order whereby the Court below has refused to revive a suit for arrears of rent and to try it in accordance with law. The suit was decreed *ex parte* on the 15th December, 1914. The defendant in the suit was an infant represented by his mother as guardian *ad litem*. After the *ex parte* decree had been made, a suit was instituted on behalf of the infant by another guardian to set aside the *ex parte* decree on the ground that the infant was not properly represented and that the decree in fact had been obtained by fraud. This suit was decreed on the 30th June, 1916, and the *ex parte* decree was set aside. On the 11th September, 1916, the plaintiff applied to the Court to revive the original suit and to try it in accordance with law. The Court refused the application on the 20th November, 1916. In support of this order, reliance has been placed upon the decision in *Khettra Mohan v. Mangobinda* (1). It is not disputed, however, that this decision is contrary to the view taken by the Judicial Committee in *Khajooronissa v. Rowshan Jehan* (2), which was not brought to the notice of the Court. The Judicial Committee has ruled that when a consent decree was set aside, the result was to relegate the parties to the position they previously occupied, with the result that the suit which had terminated in the consent decree had to be retried when the consent decree was vacated. The same course was followed by this Court in the case of *Rajkumar Roy v. Hare Krishna Chakrobarty* (3), where it was pointed out that a similar view had been adopted by the House of Lords in *Neale v. Gordon Lennox* (4). [*Bibee Solomon v. Abdool Azees* (5); *Sarat v. Kartik* (6); *Sarvesh v. Khetra* (7); *Chatterjee v. Durgadutt* (8); *Fateh Chand v. Narsingh* (9)]. No doubt, in the present case the suit terminated in an *ex parte* decree and not a

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(1) (1910) 14 C. W. N. 558.

(2) (1876) I. L. R. 2 Cal. 184.

(3) (1910) 15 C. L. J. 217.

(4) (1902) A. C. 465.

(5) (1881) I. L. R. 6 Cal. 687.

(6) (1883) I. L. R. 9 Cal. 810.

(7) (1910) 11 C. L. J. 346.

(8) (1915) 23 C. L. J. 436.

(9) (1912) 22 C. L. J. 383.

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consent decree. That, however, makes no difference in point of principle. The suit had been terminated by an *ex parte* decree. That decree has been set aside by a Court of competent jurisdiction. The effect is that the decree whereby the suit was terminated stands cancelled, and the suit remains on the file of the Court as an undisposed of suit. In these circumstances, it is incumbent upon the Court to proceed with the trial of the suit. If the plaintiff does not wish to proceed with the trial of the suit, the Court must dismiss it. But if the plaintiff desires to proceed with the suit, it must be tried in accordance with law.

The result is that the Rule is made absolute and the order of the Court below discharged. The suit for rent will stand revived and will now be tried in accordance with law. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at one gold mohur.

A. T. M.

Rule made absolute.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

CIVIL.

1917.

March, 22.

RAMPROSAD PARAMANIK AND OTHERS

v.

SRICHARAN MANDAL.*

Jurisdiction—Small Cause Court—Suit for compensation for acts which are offences—Provincial Small Cause Courts Act (IX of 1887 as amended by Act VI of 1914), Schedule II, Art 35—Jurisdiction, absence of—Higher Court, duty of.

A suit for compensation for wrongfully cutting a tree grown, and misappropriating crops raised, by the plaintiff on his land, is excepted from the cognizance of a Court of Small Causes by article 35 sub-clause (ii) of the second schedule to the Provincial Small Cause Courts Act.

When there is an entire absence of jurisdiction, no action on the part of the plaintiff, no inaction on the part of the defendant, can invest the Court with jurisdiction, for jurisdiction cannot be created by waiver or consent [*Golab Sao v. Madho Lal* (1) referred to] and when a subordinate tribunal has usurped jurisdiction, it is incumbent on the Court of appeal or revision to interfere; *Surendra v. Bangsibadan* (2) referred to.

* Civil Rule No. 923 of 1916, against the decision of Babu Hiralal Mookerjee, Small Cause Court Judge of Boalia, dated the 31st August, 1916.

(1) (1905) 2 C. L. J. 384.

(2) (1916) 24 C. L. J. 533 (536.)

Application for revision under section 25 of the Provincial Small Cause Courts Act by the Defendants.

Suit for compensation for a tree wrongfully cut and for crops misappropriated by the Defendants

The material facts and arguments are stated in the judgment.

Babu Jatindra Mohan Choudhry for the Petitioners.

Babu Krishna Kamal Maitra for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee, J.—This rule is decided against a decree of a Court of Small Causes in a suit for compensation for a tree wrongfully cut and for crops misappropriated by the defendant. The case for the plaintiff was that the land in dispute was his property and was in his possession, that the tree had been grown and the crops of mustard raised by him and that the defendant had unlawfully cut and removed the tree and the crops.

It is plain that a suit of this description is excepted from the cognizance of a Court of Small Causes by Art 35 sub-clause (ii) of the second schedule to the Provincial Small Cause Courts Act which has been inserted therein by the Provincial Small Cause Courts Amendment Act, 1914. This provision excludes from the jurisdiction of Courts of Small Causes, suits for compensation for acts which are or, save for the provisions of chapter IV of the Indian Penal Code, would be, offences punishable under chapter XVII, of the said Code. It is clear that if the acts attributed to the defendants are true, they have been guilty of mischief, if not of theft. Consequently, the suit could not be tried by the Court of Small Causes. No objection, however, appears to have been raised to the trial of the suit. But, after the suit had been decreed, the defendants applied for review of judgment. The Court refused the application for review with ground that the objection as to jurisdiction was not raised at the trial. In our opinion, the review should have been granted. The objection as to jurisdiction was apparent on the face of the record. The plaintiff could succeed, only if his allegations as to possession were established. Indeed, on the evidence the Court ultimately found that the allegations were true and proceeded to grant relief to the plaintiff on that basis. It is clear that, under such circumstances, omission on the part of the defendants to take exception to the jurisdiction of the Court could not legalise the acts of the Court. Where there is an entire absence of jurisdiction, no action on the part of the plaintiff, no inaction on the part of the

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* defendant can invest the Court with jurisdiction, for jurisdiction cannot be created by waiver or consent [*Golab Sao v. Chowdhury Madho Lal* (1)] ; and when a subordinate tribunal has usurped jurisdiction, it is incumbent on this Court to interfere [*Surendra v. Bangsibadan* (2).] The result is that this rule must be made absolute and the decree of the Small Cause Court Judge set aside. We direct that under order 7, rule 10, Civil Procedure Code the plaint be returned to the plaintiff for presentation to the proper Court. As the objection to jurisdiction was not raised at the earliest possible stage the plaintiff is entitled to the costs which have been thrown away, that is, the costs of the hearing in this Court as also in the Court below. We assess the costs in this Court at Rs. 16 and the costs in the Court below at Rs. 10. The defendants must pay the plaintiff this sum (Rs. 26) irrespective of the ultimate result of the suit.

A. T. M.

Rule made absolute.

(1) (1908) 2 C. L. J. 384.

(2) (1916) 24 C. L. J. 533 (536)

APPELLATE CIVIL

Before Mr. Justice Richardson and Mr. Justice Walmisley.

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March, 21, 22.

BEJOY KRISHNA MUKERJEE AND OTHERS

v.

JIBON KRISHNA GANGULY AND OTHERS.*

Remand—Civil Procedure Code (Act V of 1908), O. 41, Rr. 23, 27—Inherent power—Additional evidence.

The appellate Court has inherent power of remand in cases other than those specified in Order 41, rule 23 of the Code of Civil Procedure, if a remand be necessary for the ends of justice: *Ghaznavi v. The Allahabad Bank* (1) explained.

Where the appellate Court remanded to the primary Court for a fresh decision after receiving in evidence the documents tendered by the plaintiffs as also any further evidence which they and the defendants might adduce in support of their respective cases :

* Appeal from Appellate Decree No. 1755 of 1917, against the decision of Babu Kedar Nath Chaudhury, Subordinate Judge of Hooghly, dated the 12th July, 1917, reversing that of Babu Narain Chandra Ghose, Munsiff of Serampore, dated the 23rd December, 1914.

(1) (1917) I. L. R. 44 Cal. 929 ; 26 C. L. J. 49.

Held, that the order was not an order which it was open to the appellate Court to make under order 41 rule 23 of the Code of Civil Procedure ; that the appellate Court should have taken action under order 41, rule 27; that in so ordering it did not decide the case on the evidence on the record or deal with it under order 41, rule 27 if additional evidence was necessary.

Appeal by the Defendants.

Suit for recovery of possession of land.

The material facts and arguments appear from the judgment

Babus Mahendra Nath Ray, Sarat Chunder Mukerjee and Sasadhar Ray (Sr.) for the Appellants.

Dr. Dwarka Nath Mitter and Babu Debendra Nath Mandal, (for *Babu Bejoy Kumar Bhattacharjee*) for the Respondents.

The judgments of the Court were as follows :

Richardson, J.—This appeal arises out of a suit for recovery of possession of a small piece of land to which the plaintiffs claim title to the extent of a 5 annas 6 gundas 2 karas and 2 krantis share. The suit has already occupied a great deal of time both in the trial Court and in the hearing of the appeal in the lower appellate Court. Before the learned Munsiff the trial began on the 3rd November, 1914, and was not concluded till the 23rd December, 1914, when the suit was dismissed. The practice of trying cases piecemeal has been so often animadverted upon that it is only necessary for us to invite attention to the observations which have been made by this Court in previous cases.

It appears that before the lower appellate Court three questions were argued: first, whether the principal defendants are the co-sharers of the plaintiffs and the *pro forma* defendants in respect of the land in suit: *secondly*, whether the plaintiffs are estopped from maintaining the suit and, *thirdly*, whether their right is time-barred. Upon the second and the third questions the learned Subordinate Judge found in favour of the plaintiffs who were the appellants before him. Then he dealt with the third (first?) question which formed the most important part of the case. He discussed the evidence at some length and with considerable detail; having done so, however, he came to the somewhat important conclusion that the evidence on both sides was so unsatisfactory and inconclusive that he was unable to determine whether the defendants were or were not the co-sharers of the plaintiffs in respect of the land. Having taken that view of the case, he then referred to certain documents. These are the four documents set out in a schedule to a petition filed by the plaintiffs in the trial Court on the 9th December, 1914.

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It appears that complaint was made by the plaintiffs that these documents had not been received in evidence by the Munsiff and the learned Subordinate Judge remarked as follows:—"it seems to me that if admitted in evidence they might throw some valuable light on the point in controversy." He goes on to say that in the circumstances in his opinion a chance should be given to both the parties to produce any further evidence they can produce in support of their respective cases. The order which was finally made was that the suit should be remanded to the trial Court for a fresh decision after receiving in evidence the documents tendered by the plaintiffs appellants as also any further evidence which they and the defendants might adduce in support of their respective cases.

In the appeal before us which is preferred by the principal defendants, it is contended that this order of remand is not warranted by the provisions contained in order 41, rule 23, Code of Civil Procedure. In my opinion, that contention cannot be gainsaid. The order is not an order which it was open to the learned Subordinate Judge to make under order 41, rule 23. The Munsiff certainly did not dispose of the case upon a preliminary point. On the contrary, the trial lasted for many days and both parties had ample opportunity to produce and tender all the evidence in their possession, or which they were able to bring before the Court. It is said that the case of *Ghaznavi v. The Allahabad Bank* (1), covers such an order as that which the Subordinate Judge has made. In my opinion, that is a total misapprehension of the effect of the decision of the Full Bench. The decision recognises the inherent power of remand in cases other than those specified in order 41, rule 23, if a remand be necessary for the ends of justice. In the present case I cannot persuade myself to believe that any remand was necessary for the ends of justice. If the learned Subordinate Judge thought that additional evidence was necessary, he might have taken action under rule 27 of the same order. He might have taken the evidence himself or he might have asked the trial Court to take the evidence and to send it up to him. Having regard to the time already spent in the case, in my opinion, it is most unfortunate that the Subordinate Judge took the course he did take and did not decide the case on the evidence on the record or deal with it under order 41, rule 27 if additional evidence was necessary.

The result is that in my opinion, the order of remand passed by the Subordinate Judge must be set aside. The difficulty is to know what is the proper order to make in the circumstances. We are

(1) (1917) I. L. R. 44 Calc. 929; 26 I. L. J. 49.

informed that the learned Subordinate Judge who heard this appeal in the first instance has left the district temporarily and may return. This case must go back to the lower appellate Court in any case. If on its return to that Court it comes before the Subordinate Judge who last heard it, then he will consider the documents to which I have referred. He will consider whether they were properly tendered and tendered in time in the trial Court. He will consider whether they ought or ought not to be admitted in evidence and if he comes to the conclusion that they ought to be admitted in evidence he will be at liberty to admit them and give the parties an opportunity to produce either before himself or before the Munsiff such evidence as they may wish to produce for the purpose only of supporting or rebutting the evidence supplied by the documents. He will then come to a decision upon the whole case and make a decree accordingly. If this case, however, when it goes back to the lower appellate Court, should come before another Subordinate Judge, it will be impossible for him satisfactorily to carry out such an order as we have just made. In that case the Subordinate Judge will have to rehear the appeal with all the powers which an appellate Court has under order 41. The costs will abide the result.

Walmsley, J.—I agree.

A. T. M.

Case remanded.

Before Mr. Justice Richardson, and Mr. Justice Walmsley.

MAHARAJA SIR MANINDRA CHANDRA
NANDI BAHADUR

v.

KUMAR SARADINDU RAY AND OTHERS.*

*Burden of proof—Boundary dispute—Defendant in actual possession of land—
Local investigation—Amin's map and report unsatisfactory—Remand.*

In those cases where scientific accuracy in regard to boundaries cannot be attained and especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, the ordinary

* Appeal from Appellate Decree No. 701 of 1916, against the decision of J. Cornes Esq., District Judge of Rajshahye, dated the 16th August, 1915, reversing that of D. N. Bagchi, Esq., Additional Subordinate Judge of Rajshahye, dated the 28th February, 1914.

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rule in a suit regarding the onus coming on the plaintiff has no application. The parties to the suit are in the position of counter-claimants and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary : *Lukhi Narain v. Jodu Nath* (1) referred to.

When the defendant in a suit for recovery of possession of land, even where the question is a question of boundaries, is clearly shown or found to have been in actual possession of the disputed area, the burden comes on the plaintiff to establish his title : *Dinomoni v. Brojo Mohini* (2) referred to.

It is not compulsory on the appellate Court to direct a fresh investigation, when it is dissatisfied with the map and report of the Amin. No error of law is committed in deciding on the other evidence before it : *Jagadindra v. Secretary of State* (3) referred to.

Appeal by the Plaintiff.

Suit for recovery of possession.

The material facts and arguments appear from the judgment.

Sir Rash Behary Ghose, Babus Ram Charan Mitra, Joges Chunder Dey and Hemendra Nath Sen for the Appellant.

Babus Dwarka Nath Chuckerbutty, Surendra Nath Das Gupta and Jotindra Mohan Chowdhury for the Respondents.

The judgments of the Court were as follows :

March, 19.

Richardson, J.—The plaintiff in the suit is the appellant in this appeal. The dispute between the parties relates to the boundary between two estates, that on the west belonging to the plaintiff and that on the east belong to the defendants. In the first Court, the learned Subordinate Judge on a consideration of the evidence came to the conclusion that the back of the lands belonged to the plaintiff's estate. The Subordinate Judge made a decree in accordance with that finding. On appeal, the learned District Judge took a different view and dismissed the suit.

The principal contention urged before us by Sir Rash Behary Ghose on behalf of the plaintiff, and the only contention with which we are called upon to deal is that the learned District Judge erred in respect of the mode in which he dealt with the burden of proof. It appears that on behalf of the plaintiff the District Judge was referred to the principle laid down by the Privy Council in the case of *Lukhi Narain Jagadeb v. Maharaja Jadu Nath Deo* (1). The principle as it is stated by their Lordships appears to be that in those cases where scientific accuracy in regard to boundaries cannot be

(1) (1893) I. L. R. 21 Calc. 504 ; L. R. 21 I. A. 39.

(2) (1901) I. L. R. 29 Calc. 187 ; L. R. 29 I. A. 24.

(3) (1902) L. R. 30 I. A. 44 (54) ; I. L. R. 30 Calc. 291.

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attained and especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, then the ordinary rule in a suit regarding the onus coming on the plaintiff has no application. The parties to the suit are in the position of counter-claimants and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary. Referring to that case the learned District Judge says that the principle is only laid down in respect of boundaries in large areas of waste lands and that in the present case the plaintiff has to shoulder the ordinary burden of proving his case. It is not, in my opinion, necessary to consider for the present purpose what, if any, limitation should be placed upon the principle as their Lordships stated it, a principle which when the evidence as to possession is equally balanced or unreliable is of great utility in those parts of the country where expert surveyors are not easily obtainable, and where boundaries may depend on the identification by evidence of trijunction points and so forth. Even if the learned District Judge be wrong in supposing that the principle applies only in regard to large areas of waste lands, his conclusion, though it may rest on a wrong ground nevertheless seems to be right. It is clear that he had before him on the record the fact that the defendants against whom the suit was brought had been in possession for some years under an order of the criminal Court made in accordance with the provisions of section 145, Criminal Procedure Code. The learned pleader for the defendants has gone so far as to argue, though the point was not apparently taken before the learned District Judge, that the present suit was brought beyond the period of limitation prescribed by Art. 47 of the schedule of the Limitation Act. Whether that is so or not may perhaps be doubtful and may depend on further questions of fact as to who were the parties who appeared or were represented in the proceedings before the Magistrate. That question not having been considered by the District Judge, it would not be right for us in second appeal to deal with it. It still remains, however, that the defendants were in possession under this order which was made in the year 1904 and they remained in possession till the date when the suit was brought in January 1910. Regard being had to the decision of the Privy Council in *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* (1), it seems clear that the principle stated in *Lukhi Narain v. Jodu Nath Deo* (2) must yield to the circumstances of the present case and that the burden of proof

(1) (1901) I. L. R. 29 Calc. 187 ; L. R. 29 I. A. 24.

(2) (1893) I. L. R. 21 Calc. 504.

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was on the plaintiff to show that the persons in possession under the order of the Magistrate had no right to possession. *Dinmoni Chowdhurani's case* (1) suggests that when the defendant in a suit for recovery of possession of land, even where the question is a question of boundaries, is clearly shown or found to have been in actual possession of the disputed area the burden will in that case come on the plaintiff to establish his title. Though, therefore, the learned District Judge may have given a wrong reason for his view that the burden of proof was on the plaintiff that view seems to be correct in the circumstances of the present case. If the burden of proof is on the plaintiff, no ground exists in second appeal for disturbing the finding of fact at which the learned District Judge has arrived. He was entitled to deal with the report of the Ameen appointed to make a local investigation. He was entitled to come to a conclusion on the evidence that the map prepared by the Ameen did not represent the true boundary.

A complaint is made that if the District Judge was dissatisfied with the map and report of the Ameen he did not as it is said, he should have done, direct a fresh investigation. As to that, in the first place, it was not compulsory on the learned Judge to direct a fresh investigation and in the words used by the Privy Council in *Maharaja Jagadindra Nath Roy v. Secretary of State for India in Council* (2), while it was no doubt open to the District Judge to take that course of sending back the case for further inquiry, he committed no error of law in deciding as he did on the evidence before him. Whether he was right or wrong in the decision to which he came, is not a question into which we can enter in second appeal. Moreover from an observation to be found in the District Judge's judgment it appears that the plaintiff had an opportunity for further enquiry but he did not take advantage of it. The learned Judge says that the appellants before him *i.e.*, the defendants, were perfectly willing to abide by the Revenue survey line if it were relaid by a competent surveyor but the respondent, that is, the plaintiff, would not accept this offer.

In the circumstances, in my opinion, this appeal fails and should be dismissed with costs.

Walmsley, J.—I agree.

A. T. M.

Appeal dismissed.

: (1) (1910) L. L. R. 29 Calc. 187.

(2) (1902) L. R. 30 I. A. 44 (54); I. L. R. 30 Calc. 291.

Before Mr. Justice Richardson and Mr. Justice Beachcroft.

SOONAULLA SARKAR

v.

TULA BIBI.*

CIVIL.

1918.

January, 18.

February, 5.

Declaratory suit—Specific Relief Act (I of 1877, Secs. 42, 43—Declaration that marriage invalid—Suit by Mahomedan mother and certificated guardian.

A suit for a declaration by a Mahomedan mother and certificated guardian that a ceremony purporting to be a ceremony of marriage between the plaintiff's daughter and the defendant was not duly performed and was invalid, is not maintainable under section 42 of the Specific Relief Act.

Appeal by Defendant No. 1

Suit for a declaration that a ceremony purporting to be a ceremony of marriage between the plaintiff's daughter and the defendant No. 3 was not duly performed and was invalid.

The material facts appear from the judgment of Richardson, J.

Babu Dharendra Nath Bishgi (for *Babu Brojendra Nath Chatterjee*) for the Appellant

Babu Krishna Kamal Maitra for the Respondent.

C. A. V.

The judgments of the Court were as follows:

Richardson, J.—The plaintiff in this suit is the mother and certificated guardian of a minor Muhammadan girl. The defendant No. 1, the appellant, before us, is the uncle of the girl. He is said to be the step-brother of the defendant No. 2, who is the father of the minor defendant No. 3, Baharulla Mandal.

The suit was brought for a declaration that a ceremony purporting to be a ceremony of marriage between the plaintiff's daughter and the defendant No. 3 was not duly performed and was invalid. The Courts below have concurred in making the declaration sought and this appeal is preferred by the defendant No. 1.

The question whether the rites required by the Muhammadan Law were duly performed turns on matters of fact and if the decrees of the Courts below were not otherwise open to objection, their finding on that question would be binding on us.

On behalf of the defendant No. 1, however, it has been contended throughout that the suit is not maintainable by the plaintiff on the ground that she has no right or authority to intervene in matters relating to the marriage of her daughter. It is said that

* Appeal from Appellate Decree No 1150 of 1916, against the decree of Babu Bhagabati Charan Kundu, Subordinate Judge of Rajshahye, dated the 28th February, 1916, affirming that of Babu Mahendra Nath Das, Munsiff of Boalia, dated the 14th April, 1915.

February, 5.

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Richardson, J.

when, as here, the uncle is the nearest male agnate, he is the guardian for marriage of his minor niece and is in a position to compel her marriage to a bridegroom of his own selection, subject to the girl's right, on attaining puberty, to refuse her consent to the marriage and to take the proper steps to have it cancelled.

In the Courts below it seems to have been held (without reference to the rights of the uncle) that the mother as the appointed guardian of the person and property of her minor daughter has a legal character within the meaning of section 42 of the Specific Relief Act entitling her to the declaration which she seeks. The daughter's marriage or alleged marriage is apparently regarded as an invasion of the mother's rights as guardian, which, it is said, are "affected." This view of the case cannot be supported.

Clearly the legal character or status involved is the status of the two persons said to have been married, and the true objection to the suit is that the plaintiff's daughter is no party to it. She is, it would seem, treated as a chattel while her elders are disputing about her disposal in marriage, either because there are money considerations involved or because they are quarrelling about other matters. As the suit is framed, in any view of the rights of the uncle it would not be a proper exercise of judicial discretion to make any declaration under section 42 of the Specific Relief Act, inasmuch as under section 43 the decree would not be binding on the daughter.

It is unnecessary therefore to determine the relative rights of the mother and uncle in the present connection or to deal with the further question whether under any or under what circumstances it would be open to a mother either as the natural guardian or as the appointed guardian of her daughter, with a view to the protection of her daughter's interests, to bring all necessary parties before the Court and to seek a judicial pronouncement as to the validity of a form of marriage to which that daughter had been subjected.

If our decision in the present case should leave the mother in any doubt as to her duty, it will be open to her by application to ask for the advice of the District Judge.

The appeal succeeds on the ground indicated. The judgment and decrees of the Courts below are set aside and the suit dismissed. In the circumstances we make no order as to costs.

Beachcroft, J.—I agree.

A. T. M.

Appeal allowed; suit dismissed.

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Walmsley.

NARENDRA NATH KUMAR AND ANOTHER

v.

ATUL CHANDRA BANERJEE AND OTHERS *

CIVIL.

1917.

April, 25.

Rent suit—Suit by a shebait for his share of rent, if maintainable—Shebait's rights of—Bengal Tenancy Act (VIII of 1885), Sec. 148 A.

Where the administration of a trust is vested in several trustees, they all form, as it were, one collective trustee and they must exercise the powers of their office in their joint capacity. Their interests and authority being equal and undivided, they cannot act separately but all must join.

The plaintiffs and the *pro forma* defendants were joint shebait of the property dedicated to an idol. The principal defendants were the tenants in occupation of the land. The plaintiffs instituted a suit under section 148A of the Bengal Tenancy Act for recovery of one-fourth share of the rent payable by the tenant defendants on the allegation that they were interested to the extent of one-fourth in the dedicated property while the *pro forma* defendants were interested to the extent of three-fourths :

Held, that the suit was not maintainable, and that, if the *pro forma* defendants declined to join the plaintiffs, the proper course for the latter was to institute a suit for recovery of the entire arrear due : *Luke v. South Kensington Hotel* (1) and *Pyari v. Kedar* (2) referred to.

Application for revision by the Plaintiff.

Suit for rent.

The material facts and arguments appear from the judgment.

Babu Mohes Chandra Banerjee (for *Babu Jyotis Chandra Hazra*)
for the Petitioners.

Babu Sasadhar Roy (I) for the Opposite Party.

The judgment of the Court was delivered by.

Mookerjee, J.—This Rule raises the question, whether the trial Court refused to exercise a jurisdiction vested in it by law, when it dismissed the claim on the ground that the suit was not properly constituted and could not be entertained. The plaintiffs and the

April, 25.

* Civil Rule No. 889 of 1916, against an order of Babu Asutosh Ghosh, Subordinate Judge of Hooghly, dated the 9th June, 1916, affirming that of Babu Jogendra Narain Roy Chaudhuri, Munsiff of Arambagh, dated the 6th February, 1915.

(1) (1879) 11 Ch. D. 121.

(2) (1899) 1 L. R. 26 Calc. 409.

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pro forma defendants are joint shebaita of the property dedicated to an idol—Damodar Jew Thakur. The principal defendants are the tenants in occupation of the land. The plaintiffs instituted this suit under section 148A of the Bengal Tenancy Act for recovery of one-fourth share of the rent payable by the tenant defendants on the allegation that they were interested to the extent of one-fourth in the dedicated property while the *pro forma* defendants were interested to the extent of three-fourths. The Court of the first instance held that the suit as framed was not maintainable and that view has been affirmed on appeal by the Subordinate Judge. The Subordinate Judge observes that the shebaita are not co-sharers but co-worshippers and any family arrangement at which they may have arrived amongst themselves cannot entitle them to treat the debutter property as personal property and to sue personally for their share of the rent payable to the idol. He further holds that section 148A of the Bengal Tenancy Act contemplates the case of a co-sharer landlord who is entitled to sue for his share of the rent separately, and, consequently, cannot be applied to co-shebaita who have no personal interest in the debutter property and merely represent the idol for secular purposes. We are of opinion that the view taken by the Subordinate Judge in concurrence with the Court of first instance is well-founded on principle.

The true position of a co-shebait was explained by this Court in the case of *Kokilasari Dasi v. Mohunt Rudranund Goswami* (1). Where property belonging to an endowment is sought to be recovered from a third party who asserts that he is the owner thereof, all the trustees of the endowment should be made parties to the suit. Ordinarily all the trustees should be co-plaintiffs and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs. Where the administration of the trust is vested in several trustees, they all form, as it were, but one collective trustee, and they must exercise the powers of their office in their joint capacity. Their interest and authority being equal and undivided, they cannot act separately but all must join. This principle, in no way contravenes the decision of the Judicial Committee in *Jagadindra v. Hemanta Kumari* (2) and was applied to a suit for enhancement of rent in *Abdul Goffur Mandal v. Umakanta Pandit* (3), where it was pointed out that joint shebaita are for many purposes joint trustees. The same

(1) (1906) 5 C. L. J. 527.

(2) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.

(3) (1914) 19 C. W. N. 260.

principle was recognised in *Kumban v. Moorthi* (1). In the case before us, it is impossible for the plaintiffs to maintain the position that they have an interest in the land to the extent of one-fourth share and that on that basis they are entitled to collect one-fourth share of the rent from the tenant defendants. If the *pro forma* defendants declined to join with the plaintiffs in the institution of this suit, the proper course for the plaintiffs was to institute a suit for recovery of the entire arrear due: *Luke v. South Kensington Hotel Co.* (2). That a suit of this description is maintainable is clear from the decision of a Full Bench of this Court in *Pyari Mohan Bose v. Kedar Nath Roy* (3). The plaintiffs are clearly not entitled to maintain a suit for one-fourth share of the rent, and the Court below has correctly held that the suit as framed is not maintainable.

The result is that this Rule is discharged with costs. We assess the hearing fee at one gold mohur.

A. T. M.

Rule discharged.

(1) (1910) 8 M. L. T. 203.

(2) (1879) 11 Ch. D. 121.

(3) (1897) 1 L. R. 26 Cal. 409.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Walmsley.*

SARAFAT ALI

v.

ISSAR ALI.*

Contract Act (IX of 1872), Secs 69, 70—Interested in payment of money which another is bound by law to pay—Payment made lawfully—Payment made in satisfaction of decree by judgment-debtor.

Section 69 of the Indian Contract Act applies to suits where the plaintiff is, upon the facts found, entitled to recover the whole sum from the defendant on the ground that the same was in law payable by the latter.

The words "interested in the payment of money which another is bound by law to pay" in section 69 of the Indian Contract Act, are comprehensive enough

* Appeal from Appellate Decree No. 2587 of 1914, against the decision of Babu Saroda Prosad Baksī, Subordinate Judge of Midnapur, dated the 4th June, 1914, reversing that of Babu Nitai Charan Ghose, Munsiff of Tamruk, dated the 24th February, 1913.

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to include the cases of persons who are under apprehension of any kind of loss or inconvenience, and are not restricted to cases of individuals who are sure to suffer actual detriment capable of assessment in money : *Pankhabati v. Nani Lall* (1) followed.

X, a mortgagee sued A, B and C, as the representatives of his mortgagor, and obtained a decree. The decree was by consent as to two of these persons, and was *ex parte* as regards the other. A thereafter satisfied the judgment-debt in full. A then sued to recover two-thirds of the money paid by him from B and C. The primary Court, upon the facts, came to the conclusion that A had an interest in the equity of redemption, but the first appellate Court came to a different finding upon the evidence :

Held, that A was a person interested, within the meaning of section 69 of the Indian Contract Act, in the payment of the money which went to satisfy the decree : *Desai v. Bhavabhai* (2) distinguished : that, even if section 69 were not applicable, the case would be covered by section 70 of the said Act.

A payment made in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made lawfully within the meaning of section 70 of the Indian Contract Act.

Appeal by the Plaintiff.

Suit for contribution.

The material facts and arguments appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Manmatha Nath Roy* for the Appellants.

Babus Ram Chunder Mozumdar and *Jnanendra Nath Dutt* for the Respondent.

The judgment of the Court was delivered by

May, 22.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for contribution. The facts material for the determination of the question of law raised before us, stripped of superfluous details may be briefly stated. X a mortgagee sued A, B and C, as representatives in interest of his mortgagor, and obtained a decree. The decree was by consent as to two of these persons, and was *ex parte* as regards the other. A thereafter satisfied the judgment-debt in full. A now sues to recover two-thirds of the money paid by him from B and C. B and C deny that A had any interest in the mortgaged property and urge that the payment made by A must consequently be deemed voluntary. The Court of first instance, upon the evidence, came to the conclusion that A had an interest in the mortgaged property and was entitled to maintain the suit for contribution as against B and C. Upon appeal, the Subordinate Judge

(1) (1913) 19 C. L. J. 72.

(2) (1880, I. L. R. 4 Bom. 643 (653).

has held that *A* had no interest in the property, and, in this view, he has dismissed the suit. The result is that though the decree for the sale of the mortgaged properties has been satisfied with the money of *A*, though *B* and *C* have reaped the benefit of that payment, they escape all liability. The question arises, whether this position is supported by legal principle.

Section 69 of the Indian Contract Act provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. There has been some divergence of judicial opinion [*Mothooranath v. Kristotumar* (1); *Futteh Ali v. Gunganaath* (2); *Nawab Mir v. Partap* (3); *Swarnamoyee v. Hari Das* (4); *Manindra v. Jamahir* (5); *Jinnat v. Fateh* (6)] upon the question whether this section is applicable to suits for contribution properly so-called, that is, suits where the plaintiff admits his liability to pay a portion of the money actually paid by him and claims to recover the balance from the defendant: *Motichand v. Bajrang* (7); *Joynarain v. Badri Das* (8); *Satya Bhushan v. Krishna Kali* (9); *Rajani v. Ramanath* (10). But whether the section is or is not applicable to suits for contribution, it has never been disputed that it applies to suits where the plaintiff is, upon the facts found, entitled to recover the whole sum from the defendant on the ground that the same was in law payable by the latter. In the case before us, it has been found that the plaintiffs had no interest in the mortgaged properties, as was, indeed, the contention of the defendants. In this view, the plaintiffs would be entitled, if section 69 applies, to recover the whole sum from the defendants. They have, however, claimed to recover only a portion of that amount. There can be no serious doubt that the money paid by the plaintiffs was money which the defendants were bound by law to pay. The only question in controversy is, whether the plaintiffs were persons *interested* in the payment of that money.

The true meaning of the expression "interested in the payment of money" has formed the subject of judicial discussion in recent years and in the cases of *Pankhabati v. Nani Lal* (11), it was ruled

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(1) (1878) I. L. R. 4 Calc. 369.

(2) (1881) I. L. R. 8 Calc. 113.

(3) (1880) I. L. R. 6 Bom. 244.

(4) (1902) 6 C. W. N. 903.

(5) (1905) I. L. R. 32 Calc. 643.

(6) (1911) 13 C. L. J. 646; 15 C. W. N. 332.

(7) (1911) 16 C. L. J. 148 (151).

(8) (1911) 16 C. L. J. 156.

(9) (1914) 20 C. L. J. 196.

(10) (1914) 20 C. L. J. 200.

(11) (1913) 19 C. L. J. 72.

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that the words "interested in the payment of money which another is bound by law to pay" were comprehensive enough to include the cases of persons who were under apprehension of any kind of loss or inconvenience and were not restricted to cases of individuals who were sure to suffer actual detriment capable of assessment in money. On this principle, it was ruled in the cases of *Bindubashini Dassi v. Harendralal Roy* (1) and *Ridha Madhub Samanta v. Sashiram Sen* (2), that where payment is made by a person who puts forward a *bona fide* claim to the property in dispute, he is entitled to the protection afforded by section 69 of the Indian Contract Act, even though it ultimately transpires, as a result of litigation, that he had not in fact or in law the interest for the protection whereof the payment was made. In the case before us, the plaintiffs were joined as parties to the mortgage suit by the mortgagee on the allegation that they were some of the legal representatives of the deceased mortgagor. A decree was made against the property to the equity of redemption wherein they claimed an interest. In the present suit, the Court of first instance, upon the facts, came to the conclusion that they had an interest in the equity of redemption. The Court of appeal below has, however, come to a different finding upon the evidence. In these circumstances, it is impossible to maintain the view that the plaintiffs were persons in no way interested in the payment of the money which went to satisfy the decree. That decree bound the mortgaged properties wherein the defendants in the present litigation are undoubtedly interested and the plaintiff also *bona fide* claimed an equal interest. This case is consequently clearly distinguishable from *Desai v. Bhavabhai* (3), mentioned in the judgment of this Court in *Jinnat Ali v. Fatch Ali* (4). It cannot, we think, be reasonably maintained, by any stretch of language, that the payment was made by the plaintiffs with a view to manufacture evidence of title to the mortgaged properties when they knew that they had no claim whatsoever.

It is also fairly clear that even if section 69 were not applicable the case would be covered by section 70. That section provides that where a person lawfully does anything for another person or deliver anything to him, intending to do so gratuitously, and, such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered. There is no controversy that the pay-

(1) (1897) I. L. R. 25 Calc. 305.

(2) (1899) I. L. R. 26 Calc. 826.

(3) (1889) I. L. R. 4 Bom. 643 (652).

(4) (1911) 13 C. L. J. 646.

ment was made by the plaintiffs without intention to do so gratuitously. The only question is, whether this was done lawfully. Much reliance has been placed by the respondents on the cases of *Raja Baikuntō v. Uday* (1) and *Panchowri v. Hari Das* (2). We do not in any way depart from the exposition of the law contained in these cases which is perfectly consistent with the view we now take namely that a payment made in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made lawfully within the meaning of section 70.

We hold accordingly that whether section 69 or section 70 be applied, the plaintiffs are bound to succeed. In these circumstances, it is not necessary for us to consider, whether the plaintiffs might not have successfully invoked the aid of the doctrine of subrogation [*Parbu Narain v. Beni* (3); *Dhakeswar v. Harihar* (4); *Adusumalli v. Vallurapalli* (5)] to support the line of reasoning that the plaintiffs are some of the joint judgment-debtors, that they have satisfied the mortgage decree whereby they were bound along with the defendants, and that they have accordingly been subrogated of the rights of the mortgagee decree-holder.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the lower appellate Court.

A T. M.

Appeal allowed.

(1) (1905) 2 C. L. J. 311.

(2) (1916) 25 C. L. J. 325.

(3) (1904) 14 C. W. N. 361.

(4) (1914) 21 C. L. J. 104.

(5) (1913) 25 Mad L. J. 16.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Walmsley.*

SHAMA CHARAN KOTAL

v.

KUMED DASL.*

Specific performance—Contract by head of joint family—Head of the family not competent to bind others shares—Decree, nature of.

* Appeal from Appellate Decree No. 491 of 1915, against the decision of C. Tindal Esq., District Judge of Bankura, dated the 4th December, 1914, reversing that of Babu Tej Chandra Mitra, Munsiff of Bishnupur, dated the 25th August, 1913.

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* In the absence of misrepresentation or misconduct, the general rule is that where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share. The case will be different, if nothing more than partial performance is possible by reason only of the default of the defendant, because no man ought to be allowed to take advantage of his own wrong: *Sarbes v. Khetra Pal* (1) referred to.

Defendant No. 1 professed to enter into a contract on his own behalf as also on behalf of the other defendants. They were members of a joint family of which the first defendant was the head. The plaintiffs accepted the contract on the faith of the assurance that the first defendant was competent to bind the property held by himself and his co-sharers. The first defendant, it turned out, was not in a position to bind his co-sharers, but his own share was large enough for the purposes of completion of the contract made by him with the plaintiffs:

Held, that the defendant No. 1 could not escape from his obligation merely because he acted in excess of his authority and was not in a position to bind his co-sharers; and that a decree for specific performance in respect of his share of property should be made: *Nagiah v. Venkataram* (2) and *Govinda v. Apath* (3) distinguished.

Appeal by the Defendant No. 1.

Suit for specific performance of a contract for sale of land.

The material facts and arguments appear from the judgment.

Babu Bejoy Kumar Bhattacharjee for the Appellant

Babu Asiranjan Chatterjee for the Respondent.

The judgment of the Court was delivered by

May, 15.

Mookerjee, J.—This is an appeal by the first defendants in a suit for specific performance of a contract for sale of land. The contract is embodied in a petition of compromise, presented to the Court in a previous litigation between the parties, which related to a different subject-matter. The settlement was made on the assumption that the defendants would convey to the plaintiffs one-fourth share of the property in dispute. The decree was made accordingly but the defendants have declined to execute the conveyance. On the 7th May, 1913, the plaintiffs instituted this suit for specific performance of the contract. The first defendant, the appellant before us, did not enter appearance. The other three defendants contested the claim, principally on the allegation that they had not signed the petition of compromise and were in no way bound to sell the property. The Courts below have concurrently found that the negotiations were carried on by the first defendant, that at the

1) (1910) 11 C. L. J. 346.

(2) (1912) I. L. R. 37 Mad. 387.

(3) (1912) I. L. R. 37 Mad. 403.

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time the petition of compromise was executed the other defendants were not present and that the first defendant who is the head of the joint family composed of all the defendants put down his own signature as also the names of the other defendants. On these findings the Courts have concurrently held that as the first defendant had no authority to enter into an agreement with the plaintiffs for the sale of the shares of the other defendants, the latter cannot be held bound by the decree and specific performance cannot be decreed as against them. The propriety of this view has not been challenged before us. The Courts below, however, have disagreed upon one fundamental point. The first Court held that although the first defendant was a party to the contract, it could not be specifically enforced against him, because the contract was alleged to have been made with all the four defendants, as regards three of whom, it was clearly unenforceable. On appeal, the District Judge has held that as the first defendant is *prima facie* entitled to a four annas share of the property, and, is, in a position to perform the agreement to that extent, there should be a decree for specific performance in respect of that share. The District Judge has further directed an enquiry as to the extent of the share of the first defendant and the steps to be taken, if the share should turn out to be less than four annas. The first defendant has now appealed to this Court and has urged, first that the suit should be dismissed as against him and, secondly, that at any rate a decree for specific performance cannot be made against him to a larger extent than one anna share of the property in dispute. In our opinion, there is no foundation for either of these contentions.

On behalf of the appellant, reliance has been placed upon the case of *Price v. Griffith* (1), where Knight Bruce, L. J., laid down the law as follows: "Cases may be conceived where a person who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without compensation to the vendee for such part of the subject matter of the contract as the vendor is unable to convey" He then explained that such a decree could not be made in the case before him, because, in that case, there was no evidence of improper conduct or misrepresentation or of the defendant having held himself out as capable of contracting for the whole, or, in fact, any other circumstance constituting a ground for a decree as to one undivided share alone. This case was followed in *Sarbes Chandra Bose v. Khetra Pal Singh* (2), where the law was summarised in these terms: "No rule of universal application, can be laid down in cases of this des-

(1) (1851) 1 Deg. M. and G. 80. • (2) (1910) 11 C. L. J. 346.

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cription, *Hexter v. Pearce* (1), but in the absence of misrepresentation or misconduct, the general rule is that where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share. *Lumley v. Ravenscroft* (2), the case of course will be different, if nothing more than partial performance is possible by reason only of the default of the defendant, because no man ought to be allowed to take advantage of his own wrong." The case before us clearly falls, not within the general rule but within the exception. The first defendant professed to enter into a contract on his own behalf as also on behalf of the other defendants. They were members of a joint family of which the first defendant was the head. Assume that the first defendant acted honestly and believed that he had authority to bind his co-sharers by this agreement. But the result has proved otherwise. This, however, cannot affect the rights of the plaintiffs. They accepted the contract on the faith of the assurance that the first defendant was competent to bind the property held by himself and his co-sharers. The first defendant, it turns out is not in a position to bind his co-sharers, but his own share is large enough for the purposes of completion of the contract made by him with the plaintiffs. In such circumstances, it would be wrong to hold that the first defendant can escape from his obligation merely because he has acted in excess of his authority and is not in a position to bind his co-sharers. Reference has been made to the decisions of the Madras High Court in *Goindla N.ickan v. Apath Sahay Iyer* (3), and *Nagiah v. Venkataram Sastrulu* (4). These cases are, however, clearly distinguishable. They were cases of contracts by members of a joint Mitakshara family, and specific performance was refused, not merely as to the whole but also in respect of a share, on the obvious ground that if specific performance were decreed, the result would be a violation of law. The same doctrine was applied by this Court in the case of *Sarvesh Ch. Bose v. Khetrapal Singh* (5) where specific performance was refused against the guardian of an infant, because the result of the decree for specific performance would be that the guardian would be obliged to act in contravention of the authority of the Court which had appointed him; on the other hand if he refused to act, he would be guilty of contempt of the Court, which made the decree for

(1) (1900) 1 Ch 341.

(2) (1895) 1 Q B. 615.

(3) (1912) I. L. R. 37 Mad. 403.

(4) (1912) I. L. R. 37 M.L. 387.

(5) (1910) 11 C. L. J. 346.

specific performance. Such considerations have no application to the circumstances of this case. We hold accordingly that the decree made by the Court below is just and proper. We direct however that so much of the decree as directs an enquiry in execution as to the extent of the share of the first defendant and a possible refund of a proportionate amount of the consideration to the plaintiffs be expunged. The decree will direct specific performance of the contract for sale to the plaintiffs in respect of the one-fourth share of the property in suit. Subject to this variation the decree of the Court below is affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed: Decree modified.

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PRIVY COUNCIL.

PRESENT: *Viscount Haldane, Lord Shaw, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.*

DWARKANATH RAIMOHAN CHAUDHURI AND ANOTHER

v.

THE RIVERS STEAM NAVIGATION COMPANY, LIMITED.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

Indian Contract Act (IX of 1872), sections 151 and 152—Suit against a bailee—Proof of negligence—Indian Evidence Act, (I of 1872) section 106—Considerations where negligence on the part of a person who has to encounter a sudden emergency is in issue.

In a suit against an ordinary bailee, the limits of whose responsibility are defined in sections 151 and 152 of the Indian Contract Act, for not taking care of the goods and saving them from loss, *e. g.*, loss by fire, the bailee should, in accordance with the provisions of section 106 of the Indian Evidence Act, call all the material witnesses who were on the spot at the time of the loss, but that section of the Evidence Act does not discharge the plaintiff from proving want of due diligence, or (expressing it otherwise) the negligence on the part of the bailee or his servants.

Good sense and policy of the law impose some limit upon the amount of care, skill, and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. In a moment of peril and difficulty the Court should not expect perfect presence of mind, accurate judgment, and promptitude.

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If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best.

The Rywell Castle (1, approved)

Consolidated appeals from a judgment and two decrees of the High Court of Calcutta, (Jenkins, C. J and Woodroffe, J.), dated March 24, 1915, reversing a judgment and two decrees of Chitty, J. sitting on the Original Side of that Court (July 30, 1914.)

The facts are fully stated in the judgment of their Lordships. The plaintiffs-appellants brought two actions in respect of two parcels of jute laden on board the flat 'Jatrapore' for carriage from Bera to Rutholla Ghat at Calcutta, which were lost by fire. They claimed damages for that the defendant company had not delivered the goods in accordance with the bills of lading on the terms of which the goods were laden for carriage, and, alternatively, for not taking care of the goods and saving them from the fire which took place under the circumstances stated in their Lordships' judgment. Both the Courts below had dismissed the suits in respect of the first claim, but Mr. Justice Chitty, had decreed the suits on the alternative claim. That decree was, however, set aside on an appeal by Jenkins, C. J. and Woodroffe, J. who dismissed the suits with costs throughout.

Hence this appeal.

De Gruyther, K. C., and *Dunne, K. C.*, for the Appellants:

Leslie Scott, K. C., and *Sir W. Garth*, for the Respondents were not heard.

The judgment of their Lordships was delivered by

December, 18,

Sir Walter Phillimore:—These are consolidated appeals in two actions brought in the High Court of Judicature of Calcutta. The appellants are the plaintiffs.

They brought their action in respect of two parcels of jute laden on board the flat "Jatrapore" for carriage from Bera to Rutholla Ghat at Calcutta, on the terms of certain bills of lading, and they sued in respect of a loss of the jute by fire. The general outline of the facts in the case is as follows:—

The flat proceeded to her destination at Rutholla Ghat; but

(1) (1879) L. R. 4 P. D. 219.

when she reached her discharging berth the consignees were not ready to take delivery.

There was a dispute upon this subject in the Courts below, the plaintiffs complaining that they had been prevented from taking delivery. But this issue was found against them, and the decision on this point has not been questioned before this Board.

The flat with other cargo on board was then taken further down the Hooghly, and ultimately moored head and stern to two buoys, near a wharf called Nimtollah Ghat. She was moored with head up river outside another flat called the "Coleroon," which was fast to the same buoys. There were other flats further in shore. She had been in this position two or three days when a fire broke out on board the "Coleroon," in the early morning of the 16th December, 1912. The fire spread to the "Jatrapore," and, though the latter was ultimately got clear and towed away down river, so much mischief had been done that the greater part of the jute in question was destroyed.

In these circumstances the several plaintiffs sued the defendant Company for that the Company had not delivered the goods in accordance with the bill of lading, and alternatively for not taking care of the goods and saving them from the fire.

As the contract of carriage had been terminated by the arrival of the flat at the wharf at which delivery should have been taken, and by the neglect of the plaintiffs to take delivery in due course, the liability of the defendant Company under the bills of lading had ceased, and its responsibility thereafter was that of an ordinary bailee. The limits of this responsibility are defined in the following sections of the Indian Contract Act of 1872 :—

"151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

"152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed if he has taken the amount of care of it described in section 151."

The "Jatrapore" at the time of the fire was moored alongside the "Coleroon," as already stated. The nature of her mooring was as follows : She had a wire hawser out from one bow with an eye made at the end which was thrown over a bitt. The hawser was taken to the buoy, passed through a ring there, and led back to the other bow. There it was made fast by coiling it in a figure-of-eight over

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two bitts. There was a similar attachment with another wire hawser to the stern; and there were breast fastenings to the "Coleroon." Whether these latter were composed of wire or of ordinary rope is not quite certain. The balance of the evidence seems to be that they were of rope, and this would be the more probable state of things.

At the time of the fire the tide was flood, and the flat would therefore be straining at her stern moorings. The "Coleroon" had similar head and stern moorings. The fire broke out in the early morning on the 16th December, as already stated. It was discovered by the watchman on board the "Jatrapore" at 3-30 A.M., and no point was made that he did not discover it as soon as he should have done. He called up the serang, or native commander; and the rest of the crew awoke. The head moorings were at once cast off. It is said that certain steps were taken towards casting off the stern moorings, but that they were not successful. It is also said that an order was given for some of the sailors to undo the breast fastenings, which, for some reason, was not executed. The breast fastenings were, according to his evidence, ultimately burnt away. It appears that the pumps were put on to play on the fire. After a time the watchman and some of the crew got ashore in the jolly boat; but the serang and others remained on board the flat until Mr. Ravenscroft, the transport officer of the defendant Company, and Captain Huey, another servant of the Company, arrived with tugs and a steam-launch about 5-45 A.M.

One end of the stern mooring was then released by Ravenscroft and Huey; but as the hawser then jammed in the ring of the buoy the other end had to be cut with an axe. Then the flat was towed away. All this time the fire was continuing.

In these circumstances the plaintiffs maintain that there was negligence on the part of those on board the flat in not getting the stern moorings and breast fastenings cast off at once, so that the flat might have drifted clear with the tide. This, as they contend, could have been done in time to prevent the fire from reaching the cargo on board her.

At the trial, the learned Judge (Mr. Justice Chitty) took this view, and found against the defendant Company for the full amount of the loss, which was to be ascertained by a reference. On appeal the Chief Justice and Mr. Justice Woodroffe took the contrary view, and came to the conclusion "that the defendant Company took as much care of the jute as a man of ordinary prudence would, under

similar circumstances, have taken of his own goods of the same bulk, quality, and value."

The weight to be attached to the judgment of the learned Judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it was, in his opinion, incumbent upon the defendant Company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This, in their Lordships' view, is not a correct statement of the law.

It is true that under the Law of Evidence Act of 1872, section 106, "when any fact is especially within the knowledge of any person, the burden of proving that fact is on him"; and it was therefore right that the defendant Company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence, of the servants of the defendant Company.

It may be for the Company to lay the materials before the Court; but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant Company have not shown due care, skill, and nerve.

Before applying themselves to a close examination of the facts and such disputed points in the evidence as require more minute consideration, their Lordships desire to observe that good sense and the policy of the law impose some limit upon the amount of care, skill, and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. There have been many expressions of judicial opinion upon this subject, particularly in cases dealing with ships and navigation, where emergencies often arise with great suddenness. For this purpose their Lordships would select the case of "*The Bywell Castle*" (1).

In that case, which was one of collision, the emergency was brought about by the previous wrongful manœuvre of the vessel whose owners were complaining. But this makes no difference; the question was, What is to be required of a man who finds himself in a sudden emergency, however that emergency has been brought about? In the Court of Appeal each of the Lords Justices expressed himself in different language, but to the same effect. In a moment of extreme peril and difficulty you are not to expect

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perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best.

Here the question turns on the fact that the stern moorings were not released by the serang, nor until Ravenscroft and Huey arrived. There might also have been some point as to the breast fastenings; but, as it is clear that, supposing them to have been cast off, the tide would have pinned the "Jatrapore" against the "Coleroon" as long as her stern moorings held, and as these breast fastenings were either already burnt away before Ravenscroft arrived, or were severed by him *uno flatu* with the release of the stern moorings, any negligence—if there were any in respect to these breast fastenings—had no effect upon the ultimate loss.

Now as regards the stern moorings. The watchman gives some evidence which their Lordships were asked by counsel for the appellants to disregard, because he apparently confused stem and stern; but inasmuch as it does not appear that he was a sailor man, and as there is apparently not much difference between stem and stern in these flats, their Lordships think that it is a fair view of his evidence that, when he speaks of the forepart of the flat, he means that part which was stemming the tide. So construed, his evidence is to the effect that after casting off the wire hawser at the stem, the serang proceeded to the stern and endeavoured to cut the wire hawser at this end, but failed to do so.

The evidence of the serang is that he tried to lift the eye of the hawser from off the bitt, and that he could not do so by reason of the strain upon it. This, as the flat was riding by it to the tide, is not at all improbable. The real point made against him is that he did not attempt to lift the coil in the figure-of-eight off the bitts on the other side.

The learned Judge of first instance thought that it must have been easily removable, because when the other people arrived they found no difficulty in lifting the coil off. But it is to be remembered, first, that the tide may—and probably would by this time—have become of less force; and, secondly, that they probably had the tugs fast who could tow the vessel up toward the buoy and relieve the strain.

It is not to be inferred from the fact that Ravenscroft and Huey were able jointly to free this end when they came on board, that the serang with such assistance as he might reasonably expect to get from his crew could have done so at an earlier period.

If his story be accepted that he had tried to cast off the other end and then endeavoured to cut it with an axe, he, at any rate, made some attempt. Whether or not it should have occurred to him in the emergency, with the fire rapidly gaining ground, to try and lift off the figure-of-eight, and whether or not he could reasonably have got sufficient assistance to do so, is a matter of some doubt. He was no poltroon: he and some of the crew stayed on board till the tugs came up. He took the precaution of setting the pumps going and keeping them going, and it would take several of the crew to work these pumps.

The learned Judge of first instance said that he did not believe that the serang made any attempt to deal with the stern moorings; but he says this because he is of opinion that if the serang had tried, he could have released them without difficulty. Why, if that were so, the man remaining on board his flat in close proximity to the fire, should not have taken for his own sake, if for no other reason, such an easy step, the learned Judge does not seem to have considered. Nor does he seem to have weighed the difficulties created by the strain of the tide.

He thinks that there is a contradiction between the evidence of the serang and that of the European officers, because they speak to a jamming at the buoy, and he speaks to a jamming at the bitts. But the two accounts may well stand together; and this leads their Lordships to observe that there is a further difficulty in the plaintiffs' way.

What happened when the European officers came on board is that, after they had cast off the figure-of-eight, the hawser did not, as was expected, draw through the ring of the buoy, but for some reason, whether connected with the moorings of the other flat or flats or by reason of some kink in the wire, jammed in the ring of the buoy, so that the only thing to be done was to free it also at the other end, where the eye was over the bitts. This was done by cutting with an axe. Be it observed that the idea of lifting off the eye was evidently regarded as still impracticable.

Now, how came it that it could be cut by an axe when the serang if he speaks truth, had tried and failed? An explanation is offered. One of the tugs was towing hard at the other end, and a great

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strain was brought upon the hawser, which naturally thereupon yielded sooner to the axe.

There is therefore no reason for discrediting the evidence of the serang by the light of subsequent events ; and, if his evidence be trustworthy, the most that can be said is that he failed to appreciate the comparative facility with which he could have cast off the figure-of-eight.

The learned Judges in the Court of appeal saw no difficulty in accepting his evidence. It is possible that in one passage in their judgment there may be confusion between the difficulty of freeing the hawser from the bitts and the difficulty of getting it to pass through the ring ; but, except in this point, their judgment in favour of the defendant Company is not open to criticism.

As the hawser jammed in the ring when the figure-of-eight was cast off, the flat still remained fast ; and as there is no reason to suppose that this jamming was produced by anything subsequent to the fire, if the serang had tried and succeeded in casting off the figure-of-eight, the hawser would have jammed then, and the flat would still have remained fast, and the mischief would have been done just the same.

Therefore, even supposing that negligence were to be attributed to the serang in respect of his not casting off the figure-of-eight, and their Lordships are not prepared to go so far, the plaintiffs would still fail, because the loss was not due to that act of negligence.

There is a further point with which the Court of Appeal dealt, the learned Judges being of opinion that, supposing all the moorings to have been cast off, it was by no means shown that the "Jatrapore" would, having regard to the set of the tide and the position of the buoy and the moorings of the other flat, with which she might become entangled, have drifted away and got clear, or at any rate got clear before the fire had time to catch her. If this were so, any negligence in respect of the moorings would be immaterial.

Their Lordships feel it unnecessary to pronounce upon this point, because, for the reasons already stated, they agree with the Court of Appeal that the several plaintiffs have failed to prove negligence. Their Lordships will therefore humbly recommend His Majesty that these appeals should be dismissed with costs.

Watkins & Hunter :—Solicitors for the Appellants.

Orr, Dignam & Co. :—Solicitors for the Respondents.

J. M. P.

Appeals dismissed.

PRESENT :—*Lord Buckmaster, Sir John Edge, Sir Walter Phillimore,
Bart, and Sir Lawrence Jenkins.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Partnership—Right to dissolution, how far affected by terms of partnership contract—Power of Court to decree dissolution—Indian Contract Act, 1872 (IV of 1872), Secs. 252, 253, 254—Appellate Court, when should interfere with Court's discretion.

*A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It is not therefore a contravention of section 252 of the Indian Contract Act, for a partner to seek dissolution, or for the Court to decree it, though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. It is to meet the precise predicament that a partnership is not terminable at will, that the Court's power to decree dissolution is conferred in the events enumerated in section 254.

It is opposed to sound practice for an appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred.

Appeal from a decree of the Bombay High Court, (Sir Basil Scott, C J and Davar, J) dated the 8th September, 1914, varying a decree of Macleod J., dated the 28th March, 1914.

The facts of the case are sufficiently stated in their Lordships' judgment. Briefly, the appellant's predecessor, Nawab Kamal Khan had entered into a partnership with respondent for the quarrying and supply of stone to be used by respondents in constructing certain docks at Bombay. The partnership agreement provided that the partnership should continue until the supply of stone for the docks was completed. The partnership, however, resulted only in losses, and on that ground the Nawab sued for dissolution. Macleod, J. decreed his suit but this decision was reversed on appeal by Scott C. J. and Davar, J. They held that *Cowasjee Nanabhoy v. Lallbhoy Vallubhoy* (1) established the proposition that parties when entering into a partnership agreement may so stipulate as to relinquish their right of dissolution in the ordinary way and postpone those rights till the expiration of a period on the completion of an adventure; that that case was before the Contract Act, but that, section 252 of the Contract

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Act laid down the same rule; that the parties here had expressly stipulated that the partnership should continue till the supply of stone for the docks had been completed. They added that even if they had a discretion to declare the partnership dissolved they would not have exercised it in plaintiff's favour. The docks being by this time completed, they did not dismiss the suit, but held that plaintiff was not entitled to a declaration that the partnership came to a termination before the termination of the adventure, and directed that partnership accounts be taken up to the end of the construction of the docks.

Hence this appeal.

Upjohn, K. C., and *Sir W. Garth* for appellants. Under section 254 (6) of the Indian Contract Act, 1872, a partner may sue for dissolution of partnership when the business of the partnership cannot be carried on except at a loss. There are no circumstances here to justify the finding that the parties agreed to renounce the right of dissolving in case of loss. On a proper construction of the articles of partnership the appellants did not relinquish their statutory right to apply to dissolve the partnership in that case. *Cowasjee Nanabhoy v. Lalbhoy* (1) does not lay down that partners can contract themselves out of that right. To the contrary effect *vide* Lindley on Partnership, p. 658.

On the question of discretion, there is nothing in the facts which disentitles appellant to the benefit of the statute. Macleod J. exercised his discretion rightly in plaintiff's favour and the appellate Court had no sufficient reason for interference with it.

P. O. Lawrence, K. C., *De Gruyther, K. C.*, and *E. B. Raikes*, for Respondents: The appellate Court were right in saying this was not a contract which one party could determine merely because the business was being carried on at a loss. The articles show that there was an agreement that the partners would not take advantage of their statutory right to apply for dissolution. Whatever power the Court had to dissolve, the discretion not to dissolve has been exercised rightly and properly by the Court of appeal.

Upjohn K. C., replied.

Their Lordships' judgment was delivered by

Sir Lawrence Jenkins:—This is an appeal from a decree of the High Court at Bombay in its appellate jurisdiction, dated the 8th September, 1914, varying a decree of that Court in its original jurisdiction passed on the 28th March, 1914. The suit is for a dissolution of partnership. The original plaintiff was Nawab Kamal

(1) (1876) L. R. 3 L. A. 200; 1, L. R. 1 Bom. 468.

Khan, but he has died in the course of the suit and the present appellants are his representatives. The defendants, his partners, are the respondents in this appeal. The partnership was constituted on the 11th March, 1903, and its terms are contained in an instrument of that date. To appreciate its purpose and legal effect it will be convenient to describe briefly the events that led up to its execution. The defendants, a firm of contractors, had undertaken the construction of the New Alexandra Dock in the island of Bombay and they required for the work a large supply of granite and other stone. They accordingly made two contracts in 1906 for this supply, and in both of them the Nawab was either directly or indirectly interested.

For reasons which need not be discussed, the supply of granite and stone under these contracts was so unsatisfactory that the defendants' manager complained, and declared that he would be compelled to look elsewhere if he could not get delivery according to contract.

In the end an arrangement was made for cancellation of the two contracts and the release of all claims for their breach by the Nawab and those interested with him, and for the formation of a new partnership between the Nawab and the defendants for the quarrying and supply of the requisite granite and other stone. The defendants insisted that the Nawab should be a sleeping partner without any voice in the control and conduct of the business, so his advisers naturally demanded the insertion in the partnership instrument of a provision which would secure him against the risk of extravagant working.

To this the defendants assented, and a clause was inserted which ultimately became the 25th in the instrument as executed. It is this clause that has given rise to much of the present dispute.

In the instrument, which is expressed to be made between the Nawab, of the one part, and the defendants (hereinafter called the contractors), of the other part, after a narrative of the events leading up to the partnership, it is recited that "for the purpose of carrying out the said terms and conditions and of working the said quarries and producing stone and granite therefrom, and rendering the said quarries remunerative and profitable to the parties thereto, and in consideration of the advances to be made by the contractors," it had been arranged that the agreement should be entered into.

The instrument then provided that the Nawab and the defendants should be interested in the working of the quarries at Lingampalli and Dharur, and should share the profits and losses half and half

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(clause 1) ; that the granite and stone produced from the quarries should be furnished to the defendants for their works at the dock in accordance with their requirements and sent, delivered, and paid for as therein provided (Clause 3) ; that the working of the quarries and the partnership should continue until the supply of granite or other stone for the construction of the docks was completed, and that the partnership should then terminate and be wound up (clause 4) ; that the expenditure incurred in managing and supervising the quarries should not exceed the proportion of 10 per cent, on the cost of the work, including all charges (clause 17) ; that the royalty should be one of the expenses of working the quarries, to be defrayed out of the partnership funds or the income earned (clause 22) ; and "that the average rate of expense per cubic foot at which the stone has hitherto been quarried, exclusive of management and superintendence, shall not be exceeded in future except under extraordinary circumstances, when the rate of expense may be increased by 10 per cent" The work contemplated by the partnership was carried on, but with the one unvarying result of annual loss, which amounted to upwards of three lakhs of rupees on the 30th June, 1910. In these circumstances the present suit was instituted in October 1912, praying for a dissolution on the ground that the business of the partnership had been, and only could be, carried on at a loss.

In the plaint extravagant charges of fraud were made, but they have been abandoned. While groundless charges of this type are to be deprecated, and may well attract the consequence of an adverse order as to costs, their Lordships cannot accede to the suggestion, somewhat faintly made, that the Nawab had by these charges forfeited his right to the protection of the Court if he otherwise had a good cause of action.

The matters now in contest are (1) whether the suit is premature ; (2) what is the "average rate of expense" mentioned in clause 25 of the partnership instrument ; and (3) have there been "extraordinary circumstances" within the meaning of that clause ?

The Court of first instance decided in the Nawab's favour on the first and second of these points, and adversely to him on the third. The appellate Bench's decision was wholly adverse to the Nawab, but as the work on the docks had been completed before the hearing of the appeal, the Court directed that partnership accounts should be taken from the 11th March, 1908, up to the end of the construction work of the docks.

The Court of appeal's decision that the Nawab when he filed his suit was not entitled to claim a dissolution was based on the con-

nance of the partnership involved in the terms of the partnership agreement and on section 252 of the Contract Act. And the Court proceeded to express the opinion that, even if it had jurisdiction, it would have refused to declare the partnership dissolved at any period earlier than the completion of the work. The first and the more extreme of these propositions was not seriously pressed in argument before this Board, nor indeed could it be.

It is beyond controversy that at the institution of this suit the business of the partnership could only be carried on at a loss. This is conclusively shown by the firm's balance sheets, the profit and loss account for the period from the 1st March, 1908, to the 30th June, 1912, and the admission in the defendants' written statement. The condition described in section 254 (6) of the Indian Contract Act, 1872, is thus established, and it is provided that in this event the Court may, at the suit of a partner, dissolve the partnership. What, then, is there in the circumstances of this case to deprive the Court of its jurisdiction or the plaintiff of his right to seek the Court's assistance?

Their Lordships are unable to agree with the High Court's view that there is anything in section 252 that constitutes a bar; it appears to them to be directed to something wholly different.

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It was not, therefore, any contravention of that section for the plaintiff to seek a dissolution or for the Court to decree it though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. No man can exclude himself from the protection of the Courts, and yet, if the view of the appellate Bench is to prevail, this is what the Nawab has done, for a decree for dissolution would be the protection appropriate in the circumstances of this case. It is no answer to say that this partnership was not terminable at will; it is to meet that precise predicament that the Court's power to decree dissolution is conferred in the events enumerated in section 254. For a partnership terminable at will, no such provision would be required.

Their Lordships therefore are unable to affirm the decision of the Appellate Bench as to the competence of the suit. But this leaves open the question whether the Court's discretion should be exercised for or against the Nawab's claim. The appellate Bench

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decided adversely to it, and it was urged in argument against interference with this decision that it is opposed to sound practice for an appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. The justice of this argument is undoubted, but it was at least as relevant before the appellate Bench as it is before this Board. And yet the appellate Bench did not hesitate to express its readiness to substitute its discretion for that of the original Court, although in the view it took of the Court's jurisdiction the question could not arise.

In these circumstances the real question is whether there was or is any justification for questioning or disturbing the discretion exercised by the original Court when it passed the decree for dissolution in the Nawab's favour. It cannot be said that the Court acted capriciously or in disregard of any legal principle in this exercise of its discretion. On the contrary, there are elements in the case which can fairly be regarded as ample warrant for the first Court's decision, and for this it is enough to point to the dual position of the defendants, which brought their interests as contractors into sharp conflict with their duties as partners of the Nawab, and also to the prominence given in the recital to the common purpose that the quarries should be remunerative and profitable to the partners.

Their Lordships therefore hold that there is no sufficient ground for disturbing the original decree so far as it pronounced for a dissolution.

The next inquiry involved in this appeal is as to the amount of the average rate of expense prescribed as a limit by clause 25 of the partnership instrument. This clause was inserted as a protection for the Nawab; it in effect imposed a limit on expenditure by the controlling partners, and the measure of that limit was the rate of expenditure in the past.

It had originally been arranged that the rate should be embodied in the document. Its ascertainment had been entrusted to Mr. Chukerbutty on behalf of the Nawab, and Mr. Stuart on behalf of the defendants, but they were unable to agree to a figure in time for its inclusion in the engrossment.

On the 10th March, 1908, however, the two representatives agreed to a figure, and the contest is as to what the figure covered. On the same day Stuart wrote on behalf of the defendants, and sent to the Nawab a letter in the following terms:—

"We beg to confirm the rate agreed upon with Mr. Chukerbutty this day as referring to clause No. 25 in the proposed agreement

between you and ourselves, viz., Bombay Government, rupee 1, annas 7, per cubic foot for all labour on granite for quarrying, dressing, and hauling to station."

On the 11th the partnership instrument was executed by the Nawab at Hyderabad, and from an endorsement it appears that it was read over and interpreted to him by Chukerbutty. It probably had been previously signed by or on behalf of the defendants at Bombay, though no distinct proof as to this has been brought to their Lordships' notice.

On the 14th March the Nawab wrote to the defendants as follows :—

• "In reply to your letter, dated the 10th regarding the working expense of granite stone at Lingampalli, I beg to point out the rate of 1/7 rupees was arrived at on calculation on wrong basis. This has got to be revised on actual working before it can be acceded to."

Here it becomes necessary to refer to an admission made in the course of the suit and contained in a letter of the 30th July, 1913, written by the plaintiffs' attorneys to the defendants' solicitors. It is expressed to be in confirmation of what had passed between counsel for the parties at a meeting on the previous day and after stating that "with a view to shortening proceedings" certain charges were abandoned, it runs as follows :—

"We also give notice that for the above reasons and for the purposes of this suit only our client admits that at or about the time of signing the partnership agreement . . . it was agreed between the parties that the costs of working the quarries should not exceed the rate of 1/7 rupees (British currency) per cubic foot of stone. We think it right to add that this admission must not be taken as an admission that the said rate included only the items apparently contended for by the defendants as shown in the accounts submitted by them to our client."

This admission is of vital importance : it controls this branch of the case, and narrows the region of enquiry. Not only does it decisively affirm and place beyond controversy the fact that there was an agreement and that according to that agreement the rate was not to exceed 1/7 rupees, but it excludes the possibility of any objection to its admissibility under sections 91 or 92 of the Evidence Act. The one qualification is that the rate did not only include the three items of quarrying, dressing, and hauling. All therefore that has to be considered and determined is whether under the agreement between Chukerbutty and Stuart three items only or more than three items were covered by the accepted rate of 1/7 rupees. It is beside

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the point to speculate as to whether this figure was assessed in error ; for if error there was, the proceedings are not aptly framed for its correction.

On the question whether, in the agreement between Chuckerbutty and Stuart these three items and these alone were included, the evidence stands thus. The letter of the 10th March is explicit on the point ; it states that the 1/7 rupees were for these three items and and for nothing else. It was written and sent on the very day the agreement was made and just after Chuckerbutty had left, so there would be no room for forgetfulness in the matter. Nor is it reasonable to suppose that Stuart would have at once sat down and deliberately given a false version of the agreement. And then there is the significant circumstance that the agreement was subsequently signed by the Nawab without any protest or repudiation of the terms contained in the letter, and this was done in the presence of Chuckerbutty, who, it is sworn, was always first consulted by the Nawab before signing anything, and who on this occasion acted as interpreter. It is true that on the 14th the Nawab wrote objecting to the letter of the 10th, but his objection was not that no agreement had been made in the terms stated by Stuart, but that the calculation had been on a wrong basis. And then there is the evidence of Stuart. He declares that the rate agreed upon between Chuckerbutty and himself was 1/7 rupees per cubic foot, and that the letter of the 10th March correctly states the agreement. His veracity has not been impugned, but it has been strenuously contended on behalf of the Nawab that in view of the figures in Exhibit 27, the estimate of cost of stone prepared by Mr Gay, and of Stuart's evidence as to the use made of those figures in arriving at the rate on which he and Chuckerbutty ultimately agreed, it is impossible that the rate of 1/7 rupees could have been for the three items of quarrying, dressing, and hauling only, and that it must also have included loading, depreciation, loyalty, quarry-expenses, and incidentals.

Their Lordships recognise the force of this criticism, and realise that the coincidence of the figures in Exhibit 27 with this contention is worthy of consideration. But at the same time they feel that it would be easy to attribute too much weight to it, and more particularly as Stuart's evidence was given in answer to interrogatories and cross-interrogatories administered on commission, so that there was no opportunity of giving the examination a direction which would have elucidated the full significance of answers which now remain obscure. In the circumstances it is at least as probable that the estimate of 1/7 rupees was limited to the three

items as the result of a compact between Chukerbutty and Stuart reached by accommodation or possibly even in error, as that the agreed rate of 1/7 rupees was not limited to the three items. As it is involved in the Nawab's admission of the 30th July, 1913, that there was an agreement for a rate of 1/7 rupees, and the only evidence on the record is that this rate covered the three items and no more, in the absence of contradiction by Chukerbutty or anyone else able to speak to the point, their Lordships hold that this must be accepted, and the decision of the Appellate Bench on this point upheld.

It only remains to consider the defendants' contention that they had established such "extraordinary circumstances" as would justify the increase of the rate as provided by clause 25. The burden of making this good was on the defendants, and the question is whether they have succeeded in this. What then are the "extraordinary circumstances"? The only direct evidence is that of Gay, and all that can be spelt out of his evidence is that the circumstances occasioning greater expenditure were (1) the preparation of culvert stones and (2) the importation of labour. The first of these cannot be regarded as an extraordinary circumstance, for the schedule to the partnership instrument shows that it must have been within the contemplation of the parties when the contract was made.

So there only remains the importation of labour. This may have occasioned an increase of expenditure, but it certainly is not shown that it was an extraordinary circumstance that should raise the limit on the rate of expense prescribed in clause 25. This importation was due to an extension of the quarrying operations and was a normal development of the business made by the defendants to suit their own convenience and meet their requirements, not as partners of the Nawab, but as contractors engaged on the construction of the dock in Bombay.

Their Lordships, therefore, hold that no "extraordinary circumstances" within the meaning of clause 25 have been proved.

Their Lordships will accordingly humbly advise His Majesty to allow this appeal and to direct that the decree of the Appeal Court should be set aside and that of the original Court restored, (1) with the variation that so much thereof as orders that in taking the account thereby directed "the Commissioner do allow for the costs of quarrying provided for in clause 25 of the partnership agreement for the Lingampalli quarries rupee one and annas five per cubic foot exclusive of management and supervision, and add thereto annas two for royalty" be omitted, and that in lieu thereof it be ordered

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and decreed that "the rate for the purpose of clause 25 of the partnership agreement was and shall be rupee one and annas seven per cubic foot for the cost of the quarrying of the Lingampalli quarries mentioned in the plaint in the suit, and that this rate covers only the expenses of labour on quarrying and dressing the stones and hauling the same to the railway station, and that neither royalty nor any depreciation of plant or machinery is included in the rate so fixed"; and (2) with the further variation that the declaration "that the defendants are justified in adding ten per cent for extraordinary circumstances under the said clause 25 of the said agreement" be also omitted. Their Lordships recommend an order in the above form, as they do not wish to interfere with the discretion exercised by the original Court in its direction as to costs; and as to the costs of this appeal and the appeal to the High Court, they will recommend that there be no order save that each party bear his own.

T. L. Wilson & Co.—Solicitors for the Appellants.

Grundy, Kershaw, Samson & Co.—Solicitors for the Respondents.

J. M. P.

Appeal allowed.

PRESENT:—*Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart, and Sir Lawrence Jenkins.*

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RADHAKANT LAL AND OTHERS

v.

MUSSAMMAT NAZMA BEGUM AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

*Hindu Law—Mitakshara joint family—Issue as to joint or separate estate—
Blending of self-acquired and joint funds—Gift by Karta.*

D, a Mitakshara separated brother was acting as guardian of his minor brother *K*. On partition each of them got some ancestral properties; after partition a son was born to *D* and subsequently some property came to the brothers from the estate of a deceased brother. Only one account book was kept of their joint share of the latter property, and that system of book-keeping, which began in October 1878, was continued till February 1880, when *K* came of age. No separate book was thereafter kept by or for *D* with respect to the properties which had come to him from his deceased brother's estate, but there was one

account for all *D's* receipts from all sources, whether it was income from joint ancestral family property or from that which he had acquired from his deceased brother's estate or any other source of revenue, and similarly for all his expenditure of whatever kind. Further, on "*deorh* partition" that is an actual partition of the several properties constituting their estates, mutual exchanges were made whereby *D* gave up his share in some ancestral family property for the share of *K* in the property acquired from the brother's estate, and *vice versa*. In a suit by *D's* son and grandson (the appellants) after the death of *D* to set aside deeds of gift made by *D* in favour of the respondents on the ground that they had been made out of the joint ancestral property and was therefore invalid:

Held, (reversing the High Court) that the property coming from the brother's estate as collateral heir was *D's* self-acquired property; that by blending that property with the joint ancestral property in the accounts and by the said mutual exchanges *D* had thrown it into the common stock, and thereby converted it into joint ancestral family estate; and that all the properties purporting to be conveyed to the respondents by the deeds of gift were joint family properties over which *D* had no power of disposition and the appellants were entitled to recover them.

Lal Bahadur v. Kanhaia Lal (1) and *Pandit Suraj Narain v. Pandit Ratan Lal* (2) followed.

Ex parte appeals from a judgment and decree dated the 2nd June, 1913 of the Calcutta High Court (Chitty and Teunon, JJ.), reversing a judgment and decrees of the Subordinate Judge of Gaya, dated the 8th April, 1909. The facts of the case sufficiently appear from their Lordship's judgment. The plaintiffs Radhakant Lal and others sued to set aside two deeds of gift made by their ancestor Drigpal Lal deceased in favour of his mistress, Nazma Begam and her daughter by him named Kulsum Bibi. The main question for determination was whether the properties comprised in the said deeds were the joint properties of the Mitakshara family of which Drigpal Lal and the plaintiffs were the coparceners. The Subordinate Judge substantially allowed the plaintiffs' claim but the High Court dismissed it.

De Gruyther, K. C., and *Sir W. Garth* for the Appellants: Drigpal and his brothers did not collaterally inherit Din Dayal's properties but acquired them for valuable consideration which was paid out of joint family funds, and those properties were therefore, joint family properties under the Hindu law. Even assuming that they were self-acquired properties in the hands of Drigpal he threw them into the common stock of the joint family and treated them as joint. That was clear from the manner in which the accounts were kept and the subsequent partition proceedings. The

(1) (1907) L. R. 34 I. A. 65; 5 C. L. J. 340.

(2) (1917) L. R. 44 I. A. 201; 26 C. L. J. 267.

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High Court was in error in reversing the finding of the Subordinate Judge on that point, Relied on *Suraj Narain v. Ratan Lal* (1) and *Lal Bahadur v. Kanhaia Lal* (2).

The Respondents did not appear.

The judgment of their Lordships was delivered by

Sir Walter Phillimore.—The suits to which these consolidated appeals relate concern the validity and effect of two deeds of gift made by one Drigpal Lal, deceased, the father of the first plaintiff and appellant, and grandfather of the other plaintiffs and appellants, in favour of two concubines and the daughter of one of them.

The son asserts that he and his father were joint members of a Hindu family, and that the properties to which the gifts relate were part of the joint family estate. This is the question to be determined in the suit.

Some of the properties in question came to Drigpal from the estate of his brother, Din Dayal, and others were acquired by the use of the revenues of Din Dayal's estate; and the first matter to be enquired into is whether the property which came to Drigpal from Din Dayal's estate was self-acquired property or came to him as part of the joint family estate.

The circumstances in which it was acquired are as follows:—

Drigpal and Din Dayal were two of five brothers who were a one time all members of a joint Hindu family. Din Dayal was adopted by his uncle and went out of the family. Another brother died without male issue. This left Duli Chand, Drigpal, and Kanhaya.

These three brothers separated in estate in the year 1876.

Din Dayal died on the 8th March, 1878, leaving no issue, but leaving surviving him his widow, Rukmini, and two widows of his adoptive father.

The succession to his estate if he died intestate would therefore be as follows:—

The widow Rukmini would take for her life, giving maintenance to the other widows. These, if they survived her, would take for their lives (it matters not for this purpose in which order *inter se*), and then those who at the death of the survivors of the three widows would be the male heirs would take the property. At the moment of Din Dayal's death these would be the three brothers; but it could not be foreseen who would be the male heirs when the succession ultimately devolved upon them. Din Dayal, though he

(1) (1917) L. R. 44 I. A. 201; 26 C. L. J. 257

(2) (1907) L. R. 34 I. A. 65; 5 C. L. J. 340.

made no legal will, expressed his last wishes as to the disposal of his estate, and they were, according to the recital in an *ekrarnama*, dated the 3rd April, 1878, and executed by the widow, to the following effect :—"that after my death you" (that is, Dūli Chand and Drigpal) "and Babu Kanhaya Lal shall, as proprietors, enter upon possession of all my properties, movable and immovable, all mortgage and simple bonds, all decretal moneys, zarpeshgi moneys and Bhurna moneys, houses and money at Ramna situated in Saheb-guego, zillah Gaya, and over every other kind of properties belonging to me ; that you shall allow my wife to remain during her lifetime in possession of my dwelling-house situated in Kasba Haswa ; that you shall pay to her one lakh of rupees in cash to defray the expenses of performing religious rites and pilgrimage, from your own pocket ; that shall you allow all money in cash and ornaments which are in the house at Haswa to remain in the possession of the Mussummat during her life ; that you shall pay her rupees ten thousand in cash annually, besides clothing and grains sufficient for her use ; that you shall pay to Mussummat Jado Koer and Dhupa Koer, the widows of Babu Murali Ram, who are my mothers, rupees 2,500 each annually in cash, besides clothing and grains sufficient for their use ; that you shall make a hiba or gift to Mussummat Rama Koer, daughter of Babu Girdhar Lal, my deceased brother, of 16 annas of mouza Lodipur Jafra and Shaikhpara appertaining to Lot Lodipur Jafra, 16 annas of mouzah Korigawan appertaining to Lot Sandha Manjhigawan and 16 annas of mouzah Kumharwa Girji Bandbanna appertaining to Lot Samandih, &c., being 12 kalams known as mahal Ratni with all the dependencies and all the chunks of the mouzah aforesaid, situate in zillah Gaya ; that you shall pay rupees 1,300 in cash annually, and clothing and grains sufficient to meet her requirements, to Mussummat Annapurna, Tawaif, provided that she does not lose her chastity and character and continue in the Pardah ; that you shall make gift to Babu Somar Ram of 16 annas of mouzah Jatsari . . . ; and that you shall execute deeds in accordance with the above directions in favour of these persons."

All parties were desirous that these wishes should be carried into effect, and accordingly a series of documents were executed, the first being the *ekrarnama* already mentioned whereby the widow purported to dispose of all the property of her deceased husband in favour of the three brothers.

Then there was a bond given by the brothers to the widow with a mortgage, to secure the payment of the lakh of rupees ; a covenant, with a charge on certain property, to pay to the father's widows the

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stipulated annuities and maintenance ; a covenant with the concubine to pay her the agreed annuity and maintenance ; a deed of gift in favour of the adopted nephew ; and a similar deed of gift in favour of the niece.

The lakh of rupees was paid in two instalments within six months of the death, and the bond was discharged. The money found to pay Rukmini by the three brothers came out of ancestral family property.

The three brothers entered into possession of the estate, and paid the annuities and maintenance to the various ladies. The father's widows died first, and then Rukmini in the course of the year 1882.

The annual income of the property is said to have been rather more than half a lakh, so that the arrangement, as it turned out, was not such a bad bargain for Rukmini, and was advantageous to the father's widows. For the concubine, niece, and adopted nephew it was pure gain.

It was contended on behalf of the defendants that the *ekrarnaama* of the 3rd April, 1878, executed by Rukmini in favour of the three brothers was inoperative to pass more than her life interest, and that the brothers who survived her must be deemed to have taken the property by inheritance, in which case, being an inheritance from a collateral, it would be self-acquired, and not to have taken it by purchase, in which latter case it would be ancestral family property.

That it was the intention of the deed to pass the whole property is obvious. If Rukmini was only conveying her life interest, and if either of the father's widows had survived her, the survivor's estate would have been interposed before that of the brothers. Even if it be supposed that the father's widows were so far parties to the transaction that they could not have claimed their life interest in the event of their surviving Rukmini, there was, as already observed, no certainty that the three brothers would have all survived Rukmini, so as to be the heirs at her death. Moreover, the gifts in favour of the adopted nephew and niece would have failed.

It may be, however, that though this was the intention of the deed, its only legal operation would be the restricted one for which the defendants contend.

A widow has only a limited power of disposition of the property. She can, however, alienate the estate in certain circumstances and under certain conditions. Whether in the circumstances of this case she could effect a valid alienation is a matter of some difficulty. The Subordinate Judge thought that she could ; the High Court held that she could not,

Their Lordships are relieved from pronouncing upon this point of law, because they are of opinion that as regards the property which came from Drigpal the plaintiffs can succeed upon another ground.

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Assuming that the three brothers—and in particular Drigpal—acquired this property as collateral heirs, and took it therefore as self-acquired property, it is well established that a member of a Hindu family may convert his self-acquired property into ancestral family estate by throwing it into the common stock; and this is, in their Lordships' opinion, that which happened in the present case.

As already stated, Drigpal and his two brothers had made a partition of their joint family estate in 1876. At the time of the death of Din Dayal and the accession of the three brothers to his property, Drigpal was acting as guardian of his younger brother Kanhaya. Accordingly one book was kept for their joint share of Din Dayal's estate; and this system of book-keeping, which started on the 2nd October, 1878, was continued till the 11th February, 1880, when Kanhaya came of age. Thereafter no separate book was kept by or for Drigpal in respect of the property which had come to him from Din Dayal; but there was one account for all Drigpal's receipts from all sources, whether it was income from joint family property, or from that which he had acquired from Din Dayal, or any other source of revenue, and similarly for all his expenditure of whatever kind.

Now his son, Radhakant Lal, the first plaintiff and appellant, had been born on the 31st May, 1877, and from that time forward there had been a joint family estate for him and his father. And, if the accounts from 1880 onwards are such as to show a blending of the properties, the ordinary inference to be drawn is that Drigpal had thrown the property which he had acquired from Din Dayal into the common stock.

This matter has come more than once before this Board, and was the subject of decision in the cases of *Lal Bahadur v. Kanhaia Lal* (1) and *Pandit Suraj Narain v. Pandit Ratan Lal* (2) decided on the 30th January, 1917.

The Subordinate Judge held that Drigpal had amalgamated the two properties, and the two grounds upon which his decision to this effect is supported by the present appellants are:—

First, the intermixture of and the blending of the receipts and payments in one account with those belonging to the ancestral family property;

(1) (1907) L. R. 34 I. A. 65; 5 C. L. J. 340.

(2) (1917) L. R. 44 I. A. 201, 26 C. L. J. 267.

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And, secondly, that when Drigpal and his younger brother Kanhaya took the further step of effecting what is called "a *deorh* partition," that is, not merely a separation of interest, but an actual partition of the several properties constituting their estates, mutual exchanges were made whereby Drigpal gave up his share in some ancestral family property for Kanhaya's share in property which came from Din Dayal, and *vice versa*.

The High Court took the opposite view. As to the argument drawn from the exchange, the judgment of the High Court is as follows:—

"The first point made was with regard to the *deorh* partition which took place between Drigpal Lal and Kanhaya Lal on the 8th May, 1881. It was argued that, on that partition, Din Dayal's properties were exchanged for joint properties and *vice versa*. When, however, this point came to be investigated it appeared that there was no such general interchange as the plaintiffs would have us believe. Only two possible instances were given us, and of these one is capable of an obvious explanation and the other is not fully proved. The first instance was with regard to mouzahs Sikandarpur and Asarhi. It is doubtless the case that mouzah Sikandarpur was ancestral while mouzah Asarhi had come from Din Dayal. These mouzahs are contiguous and of equal value so far as one can tell from the *jama*. They both form part of mahal Asarhi Sikandarpur. At the partition it seems that Drigpal took 10 annas 8 pies of Sikandarpur, while Kanhaya Lal took 10 annas 8 pies of Asarhi, so that each brother got two-thirds of a separate village instead of a one-third share in the two. This clearly was a matter of convenience and cannot, we think, be regarded as evidence of amalgamation of properties ancestral and acquired from Din Dayal. Neither of these villages, it may be observed, forms part of the subject-matter of the present suit.

"Then it was said that for mouzah Pillich, touzi No. 204, an ancestral mouzah, two mouzahs, Nanand and Sonchari, which came from Din Dayal, were exchanged. For this the evidence is Exhibits 45 and 47, applications made by Drigpal Lal, and Exhibit 64, an application made by Kanhaya Lal, for mutation of names. The exchange of these villages does not appear to have been very satisfactorily established from these two Exhibits. In the absence of any *koras* or other reliable evidence as to the precise details of this partition, it would be impossible to draw the conclusion which the plaintiffs wish us to draw from the very meagre evidence with regard to these two exchanges."

It should be observed that the High Court agrees with the Subordinate Judge in respect of the exchange of Sikandarpur and Asarhi ; and their Lordships are of opinion that the exchange of Pillich for the two mouzahs specified was satisfactorily proved by the documentary evidence. This evidence was further supplemented by the oral evidence of the witness Gajadhar Lal. Moreover, there was oral evidence uncontradicted from this witness and from Bhekhi Lal, proving the exchange of two more villages. A more striking proof of the throwing together of the two properties into a common stock there could hardly be.

Drigpal gives ancestral family property, and receives his brother's share in property coming from Din Dayal. He gives Din Dayal property and receives his brother's share of ancestral family property.

There is not only one case which standing by itself could with difficulty be explained away ; but there are four instances.

Turning now to the accounts, the Judges of the High Court agree that, from and after the "*deork* partition" in 1881, Drigpal's accounts were undoubtedly more or less mixed up. But they observe that Drigpal had five Tehbils or tills. The judgment then proceeds as follows :—

"We have been taken through the accounts at great length by the learned counsel for the respondents, and we do not think that it is possible to draw any very definite conclusion from these accounts ; first, because a large number of the accounts which were kept by Drigpal or under his direction, relating to his estate, have not been produced ; and, secondly, because the plaintiff Radhakant, who alone could speak with authority as to these accounts, and their precise object and nature, has not ventured to go into the box. All the papers which were in the possession of Drigpal at the time of his death have passed to Radhakant, and the fact that he has not produced so many of them must weigh very strongly against him. There is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit. In particular, we may mention that with the exception of Exhibits 16 and 18 no books of account of the mica mining business—either the Seha books at the mines or the stock books—are forthcoming. None of the '*Khazana haveli*' or of the Calcutta books have been produced, nor have any books after 1308. In 1304 certain mouzahs acquired after the death of Din Dayal, and in 1310 certain of the Din Dayal villages, were set apart for the pocket expenses of Drigpal, and in 1309, it is said, a certain ancestral village was set apart for the pocket expenses of Radhakant. In respect of the village set apart for Drigpal, separate

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accounts were admittedly kept. None of these books have been produced. The *tamasuki bahis* dealing with bonds and money-lending business are not forthcoming, nor the books of the mail-cart business. The learned counsel for the respondents attempted to minimise the effect of this non-production of books; but it is, in our opinion, a very serious matter. If all the books of Drigpal had been produced, it might have been possible to ascertain precisely how his accounts were kept and with what object.

The plaintiffs are said not to have produced the books of the general account already mentioned, which was begun on the 11th February, 1880. The books of the general account were produced to about the end of the year 1892. The explanation offered of the non-production of the later books is that after 1892 they were thought to be of no importance, because all the properties which Drigpal bought had been acquired by this time, and the only object of producing the accounts after the first year or two was to show that these properties had been bought out of the common stock and therefore formed part of it.

This is not strictly accurate, for one property at least was bought after 1892. But once given that the account shows that the properties had been blended, the later accounts are, for this purpose, immaterial. Properties once brought into a common stock cannot be taken out of it again.

Then, as to the statement that "there is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit," their Lordships cannot accept this as accurate.

The account already so often mentioned purports to be a general account, into which all receipts and payments are brought. It might, perhaps, be said that it is only a cash book and not a ledger. But it appears to be a similar book to that which was produced to the Board in the case of *Pandit Suraj Narain v. Pandit Ratan Lal* (1) as to which their Lordships observed: "It is not strictly an account book at all, but a book in which is recorded from day to day various payments and receipts of money from different sources"; and from which their Lordships drew the inference in that case that the man who kept the account had "so blended his own property with the joint property as to make the whole joint property."

As to the non-production of the *khasana haveli*, their Lordships cannot see what assistance the production of these books, if, indeed such are kept, would have been.

(1) (1917) L. R. 44 I. A. 201; 26 C. L. J. 267.

No doubt the plaintiff, Radhakant, did not give evidence; but the men of business of the family did. And it does not appear that any point was made in cross-examination or in the conduct of the trial, that any material books had been kept back; and no such idea seems to have occurred to the Subordinate Judge.

There remains one piece of evidence which makes in favour of the respondents, and that is furnished by the recitals in the two deeds which are attacked by the present suits. They are in similar terms and are as follows :—

“ My income from ancestral properties was only 13,000 rupees, but subsequently I got the estates of Babu Girdhari Lal and Babu Dindyal Lal, yielding an income of 29,000 rupees. After my separation from Babus Dulichand and Kanhayalal, I acquired lots of properties by my own labour and exertions and from my own fund, by means of trade, and the ‘ ticca ’ (meaning a ticca lease of Dourchanch, which by making improvement now yields an income of 38,000 rupees). In this way I am now possessed of four kinds of properties, viz. :—

- (1st.) The ancestral properties;
- (2nd.) The estate of Babu Girdhari Lal;
- (3rd.) The estate of Babu Dindyal Lal; and
- (4th.) The self-acquired properties;

with regard to which I have full powers of transfer ”

The effect of these recitals, which were probably intended to make evidence, is somewhat weakened by the fact that, in a deposition made in another suit, Drigpal stated that a property which he gave to a son by one of these concubines, named Sultan Bahadur, had been given with the consent of his lawful son, the plaintiff Radhakant; and this property came from Din Dayal.

Their Lordships cannot attach sufficient countervailing weight to these recitals to displace the strong evidence from the exchanges and the accounts; and upon the whole, they come to the conclusion that, assuming that Drigpal acquired his share of the property of his brother Din Dayal as self-acquired property, he so dealt with it afterwards as to make it joint property with his ancestral family estate, of which family, the first plaintiff and, as they were born, the other plaintiffs were members.

Turning now to the deeds of gift which are attacked by the plaintiffs in the present suits, the four properties purported to be conveyed to Mussummat Nasiban, which are the subject-matter of the second suit, were properties which form part of the estate of

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Din Dayal, and therefore could not be conveyed away from the joint family estate.

As to the properties purported to be conveyed to Mussummat Nazma Begum and her daughter, the matter is more complicated. There are thirteen properties: two appear to have come from Din Dayal; the rest appear to have been bought by Drigpal at various times after Din Dayal's death.

Drigpal had a nucleus of joint family property, the income of which was nearly half a lakh. He carried on for some years a business of extracting and selling mica, as he says in the recitals in the deeds of gift; and he also claims to have carried on a profitable mail-cart business.

It was suggested for the respondents and accepted by the High Court that the profits of these two businesses and the properties purchased with them might be considered self-acquired. But in one instance certainly the land from which the mica was extracted was ancestral family property. It appears also from some of the books which have been produced that the moneys paid for wages and other expenses of winning the mica were supplied out of the general income of Drigpal, and that the profits were—as the Subordinate Judge has found—devoted to the general maintenance of the family and the education of the son Radhakant. From whatever source some of the lands from which the mica was gotten may have been acquired, the mica business was dealt with as part of the joint family property.

As to the mail cart business, it was doubtful whether there were any profits; and the receipts and payments in connection with it were all brought into the one general account.

The final result therefore is that all the properties purporting to be conveyed to the respondents were joint family property of which Drigpal could not so dispose, and that the plaintiffs and appellants are entitled to recover them from the respondents, that is, the two concubines, and the daughter of the one, and the mortgagees.

It is right to say that their Lordships were informed by counsel at the bar that so far the deeds of gift purported to pass personal property, they are not to be deemed to be attacked in the present suits, and that the recovery is to be limited to the lands.

The Subordinate Judge only gave a judgment in respect of five-sixths of the property, taking it that, at the time of Drigpal's death, there were six members of the family, namely, Drigpal himself, Radhakant, and the latter's four sons, and being of opinion that Drigpal had therefore one-sixth share in the properties which he could pass by the deeds of gift.

This, however, is an error. Drigpal had no separate sixth share. The whole property belonged to the one Hindu family, and accrued upon his death to the surviving members.

The plaintiffs appealed in respect of this matter to the High Court, and their Lordships are of opinion that their appeal should have been allowed.

Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed; that the judgment of the High Court should be reversed; that the judgment of the Subordinate Judge should be varied by declaring that the plaintiffs have right to the whole, and should get possession of the whole, of the landed properties covered by the two deeds of gift, instead of five-sixths only, and that it, so varied, should be restored; and that the plaintiffs should have their costs in the High Court, and on appeal to His Majesty in Council.

The judgment of the Subordinate Judge decreeing that each party should bear his own costs of the proceedings before him should be allowed to stand.

Heath & Hamilton : Solicitors for the Appellants.

The Respondents did not appear.

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Acts, construction of—Punctuation ; See Recoupment	1
Admissibility—Absolute conveyance alleged to be mortgage—Evidence in proof of such allegation, if admissible ; See Evidence Act, Secs. 98, 99	175
— in evidence—Agreement recorded in compromise decree—Agreement not registered—Agreement forming consideration for compromise ; See <i>Res judicata</i>	583
Admissibility in evidence—Document varying rent—Bengal Tenancy Act (VIII of 1885), Sec. 103B, Sub-sec. (3)—Mode of proof.	
A document which embodies a contract for variation of rent payable in respect of a lease, is in essence a lease, and is compulsorily registrable. If it is not registered in accordance with law, it is not only not admissible in evidence, it does not even constitute a valid and operative contract between the parties.	
If it is established that the only evidence whereon the entry under sub-section (3) of section 103B of the Bengal Tenancy Act, was made by the Settlement Officer, does not support his conclusion, that is the strongest possible proof that the entry is incorrect. The party is not limited to a particular mode of proof ; he can prove <i>aliunde</i> that the entry is in fact, incorrect. He can prove that the material whereon the Settlement Officer based his decision, does not in law justify his conclusion as to the relative rights and obligations of the parties. <i>Bogha Mower v. Ram Lakhan Misser</i>	107
Admission of appeal out of time— <i>Ex parte</i> order, if can be set aside at hearing—Question of limitation, when can be finally determined ; See Limitation	253
Adoption—Daughter's daughter's son— <i>Mitakshara</i> —Western India.	
Under the <i>Mitakshara</i> the adoption of a daughter's daughter's son in a family coming from Rajputana in Western India, is valid. <i>Blawanath Sinha v. Kallcharan Sinha</i>	119
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A widow of a separated brother can adopt of her own motion a son to her deceased husband, a Hindu of a <i>Mahezwari</i> caste of <i>Bikaner</i> . <i>Mathura Dass Karnani v. Sriklissen Karnani</i>	517
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Adverse possession—Simple mortgage—Subsequent adverse possession against	

Adverse possession—(Contd.).

mortgagor—Limitation Act (IX of 1908), Sec. 28—Mortgage suit, scope of.

Per curiam : Where a simple mortgage has been executed by a person in possession, the subsequent dispossession of the mortgagor, though it may operate by lapse of time, under section 28 of the Limitation Act, to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the simple mortgagee.

Per Mookerjee J : The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him ; the only proper persons to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage : Consequently a person who claims a title adverse to that of both the mortgagor and the mortgagee, should be discharged from the suit. *Srimati Priya Sakhi Debi v. Bireahwar Samanta* 212

Adverse possession—Symbolical possession, effect of—Adverse possessor, party to execution proceedings ; *See* Limitation 191

—possession, waste land—Tethering and throwing cow-dung ; *See Res judicata* 583

—possession against simple mortgagor, if adverse to simple mortgagee—Adverse possession commenced after mortgage, *See* Adverse possession 212

Agreement, void—Agreement opposed to public policy—Slavery bond—Service in lieu of interest ; *See* Suit, maintainability of 459

Alienation by Hindu widow—Next reversioner, suit by, for declaration—Declaration involving a finding that the claimant is the next reversionary heir—Specific Relief Act, Sec. 42 III (e) ; *See* Declaratory decree 186

Anti-adoption agreement between adoptive mother and natural father, operating in the restriction of the rights of the adopted son, if and when valid ; *See* Hindu Law—Adopted 274

Appeal—Decree upon award based on invalid reference ; *See* Reference to arbitration 339

—Appellate decree passed without jurisdiction—'Contrary to law'—Civil Procedure Code (Act V of 1908), section 100, sub-sec. (1).

No Court can entertain an appeal which it is not expressly authorised by law to hear.

An appeal lies against an appellate decree passed without jurisdiction, as the decision is contrary to law within the meaning of section 100, sub-section (1) of the Code of Civil Procedure. *Bandiram Mookerjee v. Purna Chandra Roy* 115

—Letters Patent, clause (15)—Judgment—Misjoinder of parties and causes of action—suit, stay of—Civil Procedure Code (Act V of 1908) O. 1, Rr. 1, 3—Section, construction of.

Appeal—(Contd.).

An appeal lies under clause 15 of the Letters Patent, against an order which, in substance, decides a question of jurisdiction. When a Court refuses to proceed with the trial of a suit on the ground of misjoinder of parties and causes of action, the Court may be said to be "unable to entertain it" and the reason is of a "like nature" with defect of jurisdiction.

Where it was decided that there had been misjoinder of parties and causes of action, that the plaintiff could not be allowed to proceed in one suit against the defendants, and the hearing was adjourned for the plaintiff to elect against which of the defendants he would proceed, *held*, that the decision was a judgment affecting the merits of the question and determining some right or liability between the parties.

Rules 1 and 3 of order 1 of the Code of Civil Procedure apply to questions of joinder of parties as also of causes of action.

The determining factors applicable to the question whether a suit has been constituted in conformity with order 1 rule 3 of the Code of Civil Procedure, are, *first*, could the right to relief against the defendants be said to be *in respect of* or *arising out of* the same act or transaction, and, *secondly*, would any common question of law or fact arise, if separate suits were brought. The Code does not require that all the questions of law or fact which arise, should be common to all the parties.

Per Mookerjee, J. :—The true test to be applied in the solution of the question of the competence of the appeal against a determination that there has been a misjoinder of causes of action in the suit and the plaintiff cannot be allowed to proceed against the defendants as they at present stand on the record, is not the form of the adjudication but its real effect on the suit or proceeding in which it has been made.

The determination of the question whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action, depends upon the allegations made in the plaint.

In considering the construction of a section in an Indian Act, which is professedly based on an English enactment, which in fact reproduces almost word for word the language of the English enactment, the Judges are in practice, if not in theory, bound by the decisions of the English Court of Appeal.

If one has a cause of action against A and B for a tort X and quite a separate cause of action against B for tort Y, he cannot in one action unite claims in respect of both torts X and Y against A and B.
Romendra Nath Roy v Brojendra Nath Dass 158

— *Suit, dismissal of, under O. 9, R. 4 of the Code of Civil Procedure (Act V of 1908).*

No appeal lies against an order refusing to set aside a dismissal of a suit under rule 4 of Order 9 of the Code of Civil Procedure. *Pitambar Dhal v. Baldyanath Shet* 117

Appeal—Suit instituted before Settlement officer—Transfer to civil Court—Appeal, if lies to Special Judge—Bengal Tenancy Act, Secs. 50 cl. (2), 106—Fixity of rent, presumption of—Non-payment of rent for some years, if deprives the tenant of the benefit of the presumption.

Where a suit, instituted before a Settlement officer under section 106 of the Bengal Tenancy Act, was transferred under the first proviso of that section to a competent civil Court being the Court of the Munsiff,

Held that, although the suit was originally instituted before the Settlement officer; an appeal would not lie to the Special Judge against the decision of the Munsiff, but the competency of the civil Court would be ascertained under the Civil Procedure Code, and the attributes of the competency of that civil Court would follow from the transfer, and as such the Subordinate Judge had the jurisdiction to hear the appeal against the decision of the Munsiff.

A tenant can claim the benefit of the presumption arising under section 50 clause (2) of the Bengal Tenancy Act, although there was no payment of rent for some of the twenty years immediately before the institution of the suit *Kshirod Gobinda Choudhury v. Gour Gopal Dass* 281

— admission of, out of time—*Ex parte* order, if can be set aside at hearing—Question of limitation, when can be finally determined; *See* Limitation 253

— if lies to Special Judge—Suit instituted before Settlement officer—Transfer to civil Court; *See* Appeal 281

— against an order of senior Judge, if lies—Judgment materially affecting the merits of the question between the parties—Auction-sale, confirmation of; *See* Revision 418

Appellate Court—Fresh investigation, if necessary—Appellate Court dissatisfied with Amin's map and report—Error of law, if committed in deciding on other evidence; *See* Burden of proof 599

— Court, if can interfere with the discretion exercised by the trial Court on the question whether the delay in producing the documentary evidence was or was not unreasonable; *See* Suit, hearing of 119

— Court, power of—Civil Procedure Code, Secs. 107, 151 O. 41 R. 33; *See* Revenue Sale 303

— Court, when can remand a case in cases not coming under O. 41 R. 23 of the Code of Civil Procedure; *See* Remand 596

— Court, when should interfere with Court's discretion; *See* Partnership 623

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reference to Civil Procedure Code (Act V of 1908), <i>Sch. II, para 1</i> —“All the parties interested,” not joining in the reference—Award, validity of—Objection to the validity of the award taken by a party who joined in the reference, if to be given effect to—Objection at the appellate stage, if can be entertained—Decree upon the award based upon the invalid reference— <i>Appeal</i> .	
In a suit brought by the plaintiffs against several defendants, an application was made by the plaintiffs, and the defendants <i>who appeared</i>, to refer the matter in dispute to arbitration and a decree was passed by the Court against all the defendants in conformity with the award submitted by the arbitrator. Upon an appeal having been preferred by the plaintiffs against the decree ; <i>Held</i> that, all the defendants being persons interested in the suit and not having joined in the reference to arbitration, the arbitration was wholly invalid. <i>Held further</i>, that the Court could not refuse to entertain the objection as regards the invalidity of the award merely because it was taken by the plaintiffs and not by the defendants who had not joined in the application for reference to arbitration, or because it was neither taken in the Court of first instance nor taken specifically in the grounds of appeal to the High Court. <i>Held also</i>, that having regard to the fact that the objection related to the jurisdiction of the Court to make the reference, and that the reference was altogether invalid, an appeal lay against the decree based upon the award, and the decree of the lower Court upon the award based upon the invalid reference was liable to be set aside. <i>Girija Nath Roy Choudhry v. Kanai Lal Mitra</i>	
Assessment of rent—Chowkidari land transferred to zemindar—Previous settlement with putnidar—Exact mode in which putni rent was originally settled, not known ; <i>See</i> Chowkidari land	339
of rent—Rent payable by putnidar—Resumption of Chowkidari chakran land—Settlement made by Zemindar with tenant ; <i>See</i> Chowkidari chakran land	532
Assignee of mortgage decree, judgment-debtor, if can execute ; <i>See</i> Mortgage decree	494
Award—Private reference to arbitration—Costs, award of—Written notice.	110
An absence of written notice to one of the defendants does not necessarily invalidate an arbitration proceeding. Where an order for costs was made in an award made on private references to arbitration, which could be expunged and the remainder of the award would thereby remain unaffected ;	

Award—(Contd.).

Held, that the award could be enforced to that extent.

Quare: Whether the principle, that when a suit has been referred to arbitrators, they have authority to deal with the costs of reference and the award, can be extended to private references to arbitration.

<i>Mohendra Nath Das v. Mohilal Kolay</i>	104
—, decree upon, based on invalid reference, if can be set aside on appeal; <i>See</i> Reference to arbitration	339
—, if valid—"All the parties interested," not joining in the reference—Civil Procedure Code, Sch. II. para. 1; <i>See</i> Reference to arbitration ...	339
—, Suit to enforce, if maintainable in Small Causes Court; <i>See</i> Suit, maintainability of	486
—, validity of, objection to, taken by a party who joined in the reference, if to be given effect to; <i>See</i> Reference to arbitration ...	339
<i>Ballee</i> , suit against—Negligence, proof of; <i>See</i> Contract Act, Secs. 151, 152	615
<i>Bengal Land Revenue Sales Act</i> , Sec. 31—Purchase money—Mortgage; <i>See</i> Revenue Sale	303
—, Sec. 53—Purchase by proprietor—Dishonest motive; <i>See</i> Revenue Sale	303

Bengal Tenancy Act 1885, Sec. 5—*Raiyat or tenure-holder—Test—Intention of contracting parties—Presumption, where applicable—Tenancy, origin of, unknown.*

The mere fact that a tenant has sub-let his land, does not by itself establish conclusively that his status is that of a tenure-holder and not that of a raiyat. The test to be applied to determine the status of a tenant is the intention of the contracting parties.

In cases where the origin of the tenancy is unknown, the mode of user of the land may furnish a valuable clue to determine the original purpose of the tenancy and where the terms of the grant are ambiguous, evidence of conduct subsequent of the parties may also be admissible:

The presumption laid down in section 5, sub-section (5) of the *Bengal Tenancy Act*, is not applicable when the terms of the original grant are known.

It was recited in an *amalnami* granted on the 19th June, 1868, that the *monsaahs* mentioned therein were settled with the grantee for bringing them under cultivation. It also specifically directed the grantee to extirpate wild beasts and by clearing out jungle and raising embankment at his own expense to carry on cultivation and tillage and enjoy the crops thereof. No rent was settled at the time but the *amalnami* recited that a *pottah* would be granted at the proper rent in the following year. On the 14th June, 1869, the grantor executed a *pottah* in favour of the grantee. This instrument recited that on the strength of the *amalnami*, the grantee had taken possession of land exceeding 2000 bighas in area and that he had at his own expense commenced to reclaim jungles, to raise embankments and to cultivate the lands. The Settlement was made for a term of 19 years for carrying on cultivation at a progressive rate of rent. The document further authorised the grantee

Bengal Tenancy Act—(Contd.).

to continue to enjoy the profits of the lands by bringing them under cultivation either by himself or by making settlements with tenants, and a covenant was inserted to the effect that if the grantee did not cultivate the lands fit for cultivation within the term of the lease, he would be liable to compensation for loss that might be sustained by the grantor : <i>Held</i> , that the settlement was of a raiyati holding and not of a tenure and that the grantee was a raiyat. <i>Secretary of State for India in Council v. Digambar Nanda</i>	334
_____, Sec. 5 (5)—Presumption, where applicable ; <i>See</i> Bengal Tenancy Act, Sec. 5	334
_____, Sec. 5, Sub-secs. (1), (4) and (5)—Tenure-holder or raiyat—Area exceeding 100 standard bighas—Presumption—Purpose for which lease was granted—Cultivation by sub-lessee ; <i>See</i> Land tenure in Bengal	543
_____, Secs. 19, 181—Occupancy right, acquisition of ; <i>See</i> Ghatwali land	556
_____, Sec. 40, Sub-sec. (3)—Application to have rent commuted to money rent, who should entertain and determine—Officer, if can transfer application to a Settlement officer ; <i>See</i> Jurisdiction	569
_____, Sec. 40, Sub-sec. (3)—‘Officer’ ; <i>See</i> Jurisdiction	569
_____, Sec. 50 (2)—Presumption—Rent, non-payment of, for some years ; <i>See</i> Appeal	281
_____, Sec. 52—Burden of proof—Increase in area—Burden, how discharged ; <i>See</i> Rent, enhancement of	563
_____, Sec. 52—Question for decision—Landlord, claimant ; <i>See</i> Rent, enhancement of	563
_____, Sec. 52—“The area for which rent had been previously paid,” meaning of ; <i>See</i> Rent, enhancement of	563
_____, Sec. 61—Deposit, if valid—Suit for recovery of arrears of rent and for apportionment of rent ; <i>See</i> Suit, if lies	438
_____, Sec. 66 Cl. (2)—Non-occupancy raiyat, ejectment of—Decretal amount, payment of—Payment, by whom to be made—Payment by an under-raiyat, if can be accepted.	
Section 66 clause (2) of the Bengal Tenancy Act contemplates that the payment made, to be a good payment, must be a payment by or on behalf of the judgment-debtor. The Court cannot, therefore, accept the tender of the amount by an under-raiyat in order to prevent the execution of the decree for the ejectment of the non-occupancy raiyat. <i>Brojendra Nath Mitra v. Arman Sheikh</i>	478
_____, Sec. 103B, Sub-sec. (3)—Entry not supporting conclusion—Incorrect entry ; <i>See</i> Admissibility in evidence	107
_____, Sec. 104H, Sub-sec. (2)—Limitation Act, Sec. 15 Sub-sec. (2) ; <i>See</i> Limitation	374
_____, Sec. 104H, suit under—Court, what to determine.	

In a suit under section 104H of the Bengal Tenancy Act, it is not sufficient for the Court to hold that the entry in the settlement rent roll as

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to the status or the rent is erroneous. The Court must determine affirmatively the exact conditions and incidents of the tenancy as also the rent to be settled on such basis. <i>Secretary of State for India in Council v. Digambar Nanda</i>	334
—, Sec. 109—Civil Court, if can enquire into status of a tenant—Subject enquired into by Settlement officer, when hearing an application for settlement of rent ; <i>See</i> Suit, maintainability of ...	210
—, Sec. 148A.—Co-sharer landlords—Suit, form of—Decree, form of ; <i>See</i> Rent-suit	101
—, Sec. 148A—Suit by a shebait for his share of rent, if maintainable ; <i>See</i> Rent suit	605
—, Sec. 179—Putnidar and durputnidar, if enter into contract of permanent tenancy, subject to restriction that subordinate interests carved out by durputnidar will be extinguished on a sale of: his under-tenure for arrears of rents—Restriction running with land ; <i>See</i> Lease	511
—, Sec. 179, if controls cl. (b) of the proviso to section 159 ; <i>See</i> Lease	511
—, Sch. III. Art. 3—Dispossession—Landlord, purchaser in execution of his own decree for rent—Landlord obtaining delivery through Court ; <i>See</i> Execution sale	528
Bombay Regulation IV of 1827, Sec. 26	240
—, Sec. 26—General or personal law—Presumption, <i>See</i> Custom	240
Bond, if enforceable—Slavery bond—Service in lieu of interest ; <i>See</i> Suit, maintainability of	459
Boundary dispute—Scientific accuracy in regard to boundaries cannot be got—Disputed line of division runs between waste lands ; <i>See</i> Burden of proof	599
Burden of proof ; <i>See</i> Partition, suit for	441
— of proof—Bengal Tenancy Act, sec. 52—Increase in area ; <i>See</i> Rent, enhancement of	563
Burden of proof—Boundary dispute—Defendant in actual possession of land—Local investigation—Amin's map and report unsatisfactory—Remand.	
In those cases where scientific accuracy in regard to boundaries cannot be attained and especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, the ordinary rule in a suit regarding the onus coming on the plaintiff has no application. The parties to the suit are in the position of counter-claimants and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary :	
When the defendant in a suit for recovery of possession of land, even where the question is a question of boundaries, is clearly shown or found to have been in actual possession of the disputed area, the burden comes on the plaintiff to establish his title :	
It is not compulsory on the appellate Court to direct a fresh investiga-	

Burden of Proof—(Contd.).

tion, when it is dissatisfied with the map and report of the Amin. No error of law is committed in deciding on the other evidence before it : Maharaja Sir Manindra Chandra Nandi Bahadur v. Kumar Saradindu Ray	599
— of proof—Custom as a rule of decision ; <i>See</i> Custom	240
— of proof— <i>Fraudulent decree—Suspicious circumstances about fraud.</i>	
In a suit for declaration that a decree in a certain rent suit was fraudulent, the plaintiff is to prove that the rent decree was fraudulent and collusive. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition. Amjad Ali Hazil v. Ismail	137
— of proof—Mal land—Purchaser of an entire estate—Revenue sale ; <i>See</i> Evidence	133
— of proof, how discharged—Increase in area—Bengal Tenancy Act, Sec. 52 ; <i>See</i> Rent, enhancement of	563
— of proving necessity—Mortgage of joint property by a manager who is not the father—Mitakshara school ; <i>See</i> Hindu Law—Mortgage	363
Burmese Buddhist Law—Adoption—Kittima son—Proof of adoption—Publicity of relationship—Separation and inheritance—Forfeiture of inheritance.	
Under the Burmese Buddhist Law a child adopted according to the fullest form of adoption and retaining his status as an adopted child till the death of his adoptive parents is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a <i>Kittima Tha</i> . There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement or act made by his adoptive parents upon a particular date ; but it must be a matter of publicity and notoriety. The fact of the adoption can either be proved as having taken place on a distinct and specified occasion or may be inferred from a course of conduct which is inconsistent with any other supposition. But the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.	
A <i>Kittima</i> child may forfeit his right of inheritance by separating from his adoptive parents. But where there are no other children with whom the <i>Kittima</i> child seeks to compete or share the law allows him to inherit in whole or in part notwithstanding his separation. Separation working a forfeiture is a matter of intention. If the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after it, the bond is not broken. Maung Thwe v. Maung Tun Pe	68
Calcutta Improvement Act, Sec. 41(a)—‘Affected’—By the execution of the scheme ; <i>See</i> Recoupment	I.

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Calcutta Improvement Act, Sec. 41(a)—'Required for the scheme'; <i>See</i> Recoupment	I
—, Sec. 42(a)—'Land affected'; <i>See</i> Recoupment	I
—, Sec. 42 cl. (a) to be read with clause (a) of section 41; <i>See</i> Recoupment	I
—, Secs. 78, 81—Board of Trustees, power of, to acquire land; <i>See</i> Recoupment	I
—, Sec. 81, when applicable; <i>See</i> Recoupment	I
Calcutta Municipal Act and Calcutta Improvement Act, powers of; <i>See</i> Recoupment	I
Carriers Act, Sec. 10—Bill of lading, condition as to place of service, if valid; <i>See</i> Notice, service of	294
—, Sec. 10 notice under, if necessary—Knowledge of carrier; <i>See</i> Notice, service of	274
Caveat— <i>Immediate reversioner not contesting—Next reversioner, if can enter caveat, and contest the suit.</i>	
<i>A</i> died testate leaving <i>B</i> his widow. Caveats were entered by the immediate reversioner <i>C</i> and by the mother of the widow of the testator, as well as by <i>D</i> and <i>E</i> who would be reversioners if <i>C</i> were to die before the widow. <i>B</i> by settling with the executor made it impossible for him successfully to challenge the will :	
<i>Held</i> , that <i>D</i> and <i>E</i> had sufficient interest to entitle them to enter caveat and contest the suit. <i>Satindra Mohan Tagore v Sarala Sundari Debi</i>	320
Certificated guardian transferring minor's interest without the leave of the District Judge, if valid, <i>See</i> Mortgage decree	110
Charge to Jury how to be expressed; <i>See</i> Evidence, admissibility of	148
Charges, misjoinder of— <i>Crimina. misappropriation—Additional charge—Act forming one transaction.</i>	

The accused was a manager appointed by a District Judge of an idol and was as such manager, entrusted with the funds belonging to the idol. He was charged with misappropriations of portions of these funds under section 409 of the Indian Penal Code. The first item was one of Rs. 1441-9-3 said to be costs of the High Court decree in Regular Appeal No. 290 of 1909, to which the idol was a party. The second item was of a sum of Rs. 133 said to have been improperly retained by the accused on the 23rd July, 1915. The third was one of Rs. 5-12-3 also misappropriated by the accused as such manager between 14th December 1915 and 8th January 1916. Subsequently a charge under section 210 of the Indian Penal Code was added to the effect that on or about 10th December, 1914, the accused fraudulently obtained an order from the District Judge for the payment to himself of a sum of Rs. 1841-9-3 which sum was not due to him or which was larger than was due to him from the estate of the idol. This offence had some relation to one of the three charges of criminal misappropriation but not

Charge—(Contd.).

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to the other two ; and, in part, it referred to matters not included in any of those three charges as the accused was said to have committed criminal misappropriation of a further sum of Rs. 200 out of the Rs. 1841-9-3 :

<i>Held</i> , that the accused could not be legally tried on the fourth charge along with the three charges of criminal misappropriation, as it was not an act forming one transaction with them. A retrial of the accused was directed. <i>Emperor v. Rajendra Roy</i>	311
Charter Act, cl. (15)—High Court, if can interfere—Wrong decision based on mistake of fact ; <i>See Revision</i>	418
—, cl. (15)—‘Superintendence’ ; <i>See Revision</i>	418
Chowkidari Chakran land— <i>Resumption—Settlement by Zemindar with tenants—Rent payable by Putnidar—Damages—Basis of calculation.</i>	

If, in assessing the putni rent, the profits of all the lands including the Chowkidari chakran lands were fully taken into account, the putnidar will not be liable to pay additional rent for the chakran lands, when they come into his possession ; but otherwise the putnidar is bound to pay to the zamindar, in addition to the first amount assessed on resumption, a fair share of the profits derivable from the land.

The damages payable by the zemindar to the putnidar in case of dispossession by the former is measured by rent payable by actual cultivators to the putnidar. <i>Khoondkar Mehtl Hossein v. Umes Chandra Mookerjee</i> ...	494
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—————*Resumption—Transfer to Zemindar—Tenants, position of—Village Chowkidari Act (VI. B. C. of 1870), section 51.*

The chowkidari chakran lands included in a revenue-paying estate forms part of the revenue-paying estate and the Zemindar has a qualified title therein. Consequently when the lands are resumed under the Village Chowkidari Act and are transferred to the zemindar in accordance with its provisions, the estate taken by the zemindar is in confirmation and by way of continuance of his existing estate. The zemindar incurs a liability to pay additional revenue to the Government in respect of this land.

The object of section 51 of the Village Chowkidari Act is to maintain the validity of contracts made in respect of chowkidari chakran lands, and it is immaterial, whether such contracts do or do not also include other lands which are in no way affected by the resumption proceedings.

Where upon the chowkidar's vacating the lands, the zemindar took possession and allowed the chowkidar's tenants to occupy the lands as his tenants :

<i>Held</i> , that on a transfer effected in favour of the zemindar under the provision of the Village Chowkidari Act, a transferee of the zemindar could not treat the tenants as trespassers. <i>Sib Chandra Banerjee v. Surendra Chandra Mandal</i>	560
Chowkidari chakran land, title to—Purchaser at revenue sale—Sale of original	

Chowkidari Chakran land—(Contd.).

estate—Exfranchised chowkidari chakran land treated as separate estate subject to payment of separate revenue ; <i>See</i> Revenue sale	491
—chakran land, on resumption—Zemindar, if gets new estate ; <i>See</i> Revenue sale	491
—chakran land resumed under Village Chowkidari Act and transferred to zemindar—Zemindar's liability to pay revenue ; <i>See</i> Chowkidari chakran land	560
Chowkidari land—Land transferred to Zemindar—Previous settlement with putnidar—Assessment of rent.	
• The effect on a transfer of chowkidari land is to make the Zemindar hold the property subject to the rights previously created by him in favour of subordinate holders.	
The rights of the Zemindar and the putnidar as between themselves are regulated by the conditions under which the putni was created. Where, definite information is not available as to the exact mode in which the putni rent was originally settled, the same basis of calculation in making assessment is adopted, as between the State and the Zemindar on the one hand and the Zemindar and putnidar on the other hand. The assessment is to be made on the basis of the annual value calculated according to the average rates of letting land similar in quality in the neighbourhood. <i>Radha Charan Chandra v. Maharaja Ranjit Singh</i> ...	532
—, transfer of, effect of—Rights of subordinate holders ; <i>See</i> Chowkidari land	528
—, transfer of—Zemindar and putnidar, rights of, how determined ; <i>See</i> Chowkidari land	532
Civil Court, if can enquire into status of a tenant—Record-of-rights showing status of tenant ; <i>See</i> Suit, maintainability of—	210
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—Court, if can question propriety of order of commutation made with jurisdiction ; <i>See</i> Jurisdiction	569
Civil Procedure Code, applicability of, to applications under the Lunacy Act ; <i>See</i> Lunacy Act, Secs. 3(11), 63	205
—(1882), Sec. 244—Suit to redeem brought against auction-purchaser—Defective mortgage decree—Auction sale and confirmation ; <i>See</i> Mortgage suit for sale	367
—, (1908) Sec. 11—Agreement recorded in compromise decree—Agreement forming consideration for compromise—Subsequent suit on agreement ; <i>See Res-judicata</i>	583
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—, Sec. 24(4)—Transfer or withdrawal of suit—Court vested with Small Cause Court jurisdiction ; <i>See</i> Court of Small Causes	461

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—, Sec. 47—'Party'—'Representative'—Decree in a suit against a person in his representative character—Property sold, claimed in personal capacity ; <i>See</i> Suit, if lies	572
—, Sec. 73—Decree, against estate of deceased testator—Decrees capable of execution against the estate ; <i>See</i> Rateable distribution	100
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—, O. 18, Rr. 5, 6—Deposition, if should be read over to witness—Deposition, how proved ; <i>See</i> Evidence, admissibility of	377
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—, O. 21, R. 17(2)—Application for execution made in accordance with law—Properties specified in list could not be proceeded against—Application to proceed against properties specified in further and supplementary list ; <i>See</i> Execution	398
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—, O. 21, R. 32 cl. (5)—Prohibitory injunction—Mandatory injunction ; <i>See</i> Suit, if lies	506
—, O. 41, Rr. 23, 27—Remand for taking of fresh evidence—Order, if decides the case ; <i>See</i> Remand	596
—, O. 43, R. 1 (c)—Suit, dismissal of under O. 9, R. 4 of the Code of Civil Procedure ; <i>See</i> Appeal	117
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—————, O. 47 R. 8—Review granted on a particular point, if reopens the whole case ; See Review	326
—————, O. 47 R. 8, scope of	326
—————, Sch. II, para. 1—"All the parties interested," not joining in the reference—Award, if valid ; See Reference to arbitration...	339
Claim, if enforceable—Consideration moving from stranger—Debtor transferr- ing property—Vendee agreeing to pay creditor out of consideration money—Agreement not made known to creditor.	
P transferred his properties to W, who retained part of the consideration • money in his hands and agreed to apply the sum in satisfaction of a debt due to G from P. The arrangement was not brought to the notice of G :	
Held, that G could enforce his claim as against W : <i>Dwarika Nath Ash v.</i> <i>Priya Nath Malki</i>	483
Commutation, order of, made with jurisdiction—Propriety of order, if can be questioned by civil Court ; See Jurisdiction	569
Companies Act, Sec. 134—Presidency Magistrate, jurisdiction of, to try the offence—Company, situate outside the Presidency Town ; See Company	85
—————, Sec. 134 Cl. (a)—Director of a Joint Stock Company, if liable to conviction—Default in filing with the Registrar of Companies an audited annual balance sheet—No general meeting of the members ; See Company	85
Company— <i>Indian Companies Act (VII of 1913), Sec. 134—Joint Stock Com- pany—General meeting of the shareholders, not held during the year— Balance sheet, not placed before the Company—Balance sheet, not filed with the Registrar of Companies—A Director of the Company, if liable for the default—Company, situate outside the Presidency Towns—Presi- dency Magistrate, jurisdiction of, to try the offence.</i>	
A Director of a Joint Stock Company is liable to be convicted under sec- tion 134 clause (4) of the Indian Companies Act in respect of a default made in filing with the Registrar of Companies an audited balance sheet for the year, although there was no general meeting of the members of the Company, and no balance sheet was accordingly laid before the Company as required by the Act.	
Held also, that the office of the Registrar with whom the balance sheet should be filed being in Calcutta, the Presidency Magistrate in Calcutta has the jurisdiction to try the offence under section 134 of the Act.	
<i>Debendra Nath Das Gupta v. Registrar of Joint Stock Companies</i>	85
Complaint to Police—Suspecting a person, if amounts to false information— Theft in the house ; See Penal Code, Sec. 182	230
Confession, verification of, by the Magistrate in presence of accused, propriety of ; See Evidence, admissibility of	148
————— recorded by Magistrate—Confession, verification of, by the Magis- trate—Additional incriminating statements by the accused, during veri- fication, if admissible in evidence ; See Evidence, admissibility of	148

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Consent decree, setting aside of, by another decree, effect of; <i>See</i> Suit, trial of	592
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—moving from stranger—Debtor transferring property—Vendee agreeing to pay creditor out of consideration money—Agreement not made known to creditor; <i>See</i> Claim, if recoverable	483
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Continuation of execution proceeding—Application to proceed against properties specified in further and supplementary list—Properties specified in list could not be proceeded against—Application for execution made in accordance with law; <i>See</i> Execution	398
Contract— <i>Contract Act (IX of 1872), Sec. 15—Coercion—Refusal to convey equity of redemption.</i>	
A refusal to convey the equity of redemption except on certain terms, is not an unlawful detaining or threatening to detain property to the prejudice of a person, within the meaning of section 15 of the Contract Act <i>The Bengal Stone Company Ltd. v. Joseph Isaac [Joseph Hyam ...</i>	78
—, if valid—Anti-adoption agreement between adoptive mother and natural father, operating in the restriction of the rights of the adopted son; <i>See</i> Hindu Law—Adoption	274
—, if vitiated—One party to contract for sale of goods, not intending to deliver, known to the other party; <i>See</i> Wagering contracts	358
—by head of joint family—Head of the family not competent to bind other's shares—Head of the family dealing with entirety; <i>See</i> Specific performance	611
—for variation of rent payable in respect of lease—Lease; <i>See</i> Admissibility in evidence	107
Contract Act, Sec. 3—'Consideration'—Debtor transferring property—Vendee agreeing to pay creditor out of consideration money—Agreement not made known to creditor; <i>See</i> Claim, if recoverable	483
—, Sec. 15—'Unlawful detaining or threatening to detain property to the prejudice of a person'—Refusal to convey equity of redemption except on certain terms; <i>See</i> Contract	78
—, Sec. 69—'Interested in payment of money which another is bound by law to pay'—Person under apprehension of loss or inconvenience; <i>See</i> Contract Act, secs. 69, 70	607
—, Sec. 69, applicability of; <i>See</i> Contract Act, secs. 69, 70	607
—(<i>IX of 1872</i>). Secs. 69, 70—'Interested in payment of money which another is bound by law to pay'—Payment made lawfully—Payment made in satisfaction of decree by judgment debtor.	

Section 69 of the Indian Contract Act applies to suits where the plaintiff is, upon the facts found, entitled to recover the whole sum from the defendants on the ground that the same was in law payable by the latter.

Contract Act—(Contd.).

The words "interested in the payment of money which another is bound by law to pay" in section 69 of the Indian Contract Act, are comprehensive enough to include the cases of persons who are under apprehension of any kind of loss or inconvenience, and are not restricted to cases of individuals who are sure to suffer actual detriment capable of assessment in money.

X, a mortgagee sued A, B and C, as the representatives of his mortgagor, and obtained a decree. The decree was by consent as to two of these persons, and was *ex parte* as regards the other. A thereafter satisfied the judgment-debt in full. A then sued to recover two-thirds of the money paid by him from B and C. The primary Court, upon the facts, came to the conclusion that A had an interest in the equity of redemption, but the first appellate Court came to a different finding upon the evidence :

Held, that A was a person interested, within the meaning of section 69 of the Indian Contract Act, in the payment of the money which went to satisfy the decree : that, even if section 69 were not applicable, the case would be covered by section 70 of the said Act.

A payment made in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made lawfully within the meaning of section 70 of the Indian Contract Act. *Sarafat Ali v. Issar Ali* 607

—, Sec. 70—"Payment made lawfully"—Payment made in satisfaction of decree by a person party to decree ; See Contract Act, Secs. 69, 70 607

—(IX of 1872), sections 151 and 152—Suit against a bailee—Proof of negligence—Indian Evidence Act, (I of 1872) section 106—Considerations where negligence on the part of a person who has to encounter a sudden emergency is in issue.

In a suit against an ordinary bailee, the limits of whose responsibility are defined in sections 151 and 152 of the Indian Contract Act, for not taking care of the goods and saving them from loss, e.g. loss by fire, the bailee should, in accordance with the provisions of section 106 of the Indian Evidence Act, call all the material witnesses who were on the spot at the time of the loss, but that section of the Evidence Act does not discharge the plaintiff from proving want of due diligence, or (expressing it otherwise) the negligence on the part of the bailee or his servants.

Good sense and policy of the law impose some limit upon the amount of care, skill, and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. In a moment of peril and difficulty the Court should not expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with

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Contract Act—(Contd.).	
such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best. <i>Dwarkanath Raimohan Chandhury v. The Rivers Steam Navigation Company Limited</i> ...	615
—, Secs. 252, 253, 254—Right to dissolution, how far affected by terms of partnership contract—Power of Court to decree dissolution ; <i>See Partnership</i>	623
Contract of sale—Suit, nature of—Conveyance—Suit for specific performance.	
The plaintiff sued for recovery of possession of land on declaration of title by purchase or for specific performance of a contract of sale. The case for the plaintiff was that the disputed property belonged to the first four defendants, that he obtained a conveyance from them and that his vendors had not only failed to register the document and to place him in possession but had transferred the property to the fifth defendant :	
<i>Held</i> , that as regards the claim to enforce registration of the document executed in his favour by his vendor, he was bound to follow strictly the procedure prescribed by the Registration Act before he could institute a suit under section 77 to compel registration.	
That the execution of the conveyance, not followed by registration, could not be regarded as fulfilment of the contract. The plaintiff was therefore entitled to proceed against his vendors to compel them to fulfil the contract.	
That it was necessary for the plaintiff to join the fifth defendant as a party to the suit for specific performance. <i>Nasiruddin Mirda v. Bipra Das</i> ...	538
Conveyance , absolute, alleged to be mortgage—Evidence in proof of such allegation, if admissible ; <i>See Evidence Act</i> , Secs. 98, 99 ...	175
Co-accused , competency of—Joint trial—Separate trial—Complicity in same matter ; <i>See Evidence</i> , admissibility of	91
Co-mortgagee's interest , if severable or partible—Misrepresentation by some of the mortgagees ; <i>See Mortgage</i>	453
Co-sharer landlords , rights of, as to realisation of rent—Agreement with tenants to collect separately ; <i>See Rent suit</i>	101
Costs—Solicitor.	

The discretion of a Court upon the question of costs has to be exercised judicially, and the ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other.

A solicitor bringing or defending an action in person is entitled to the same costs as if he had employed a solicitor except in respect of items

Costs—(*Con. id.*).

which the fact of his acting directly rendered unnecessary. <i>The Bengal Stone Company Ltd. v. Joseph Isaac Joseph Hyam</i>	78
— Suit referred to arbitration—Private reference; <i>See Award</i>	104
— award of—Private reference to arbitration—Order for costs could be expunged—Remainder unaffected; <i>See Award</i>	104
Court, if can deprive a defendant, by amendment of plaint, of a valuable right, acquired by operation of limitation; <i>See Limitation</i>	403
—, if can order a scheme of management—Religious and non-religious lands; <i>See Hindu Law—Grant</i>	231
—, order of, not obtaining, effect of—Suit filed by manager of a Court of Wards without sanction; <i>See Suit, maintainability of</i>	125
— of appeal—Subordinate tribunal usurping jurisdiction; <i>See Jurisdiction</i>	594
— of Small Causes— <i>Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), Sec. 25—Courts vested with Small Cause Court jurisdiction—Suit, instituted in such a Court—Civil Procedure Code (Act V of 1908), Sec. 24 cl. (4)—Suit, transfer of—Court of Small Causes, meaning of—Provincial Small Cause Courts Act (IX of 1887), Secs. 5, 16.</i>	
A Court of Small Causes under section 24 (4) of the Code of Civil Procedure, from which a suit may be transferred or withdrawn does include Courts, vested with Small Cause Court jurisdiction as well as the special Courts constituted under the Provincial Small Cause Courts Act, <i>Madhusudan Gope v. Behari Lal Gope</i>	461
— of revision—Subordinate tribunal usurping jurisdiction; <i>See Jurisdiction</i>	594
Court-fee— <i>Memorandum of cross-objection—Court-fees Act (VIII of 1870 as amended in 1908)—Sch. I, Art. 1.</i>	
Court-fees should be paid on a memorandum of cross-objections precisely in the same manner as on a plaint in a suit or on a memorandum of appeal. It is incumbent upon the respondent to value the relief claimed by way of cross-objection and to pay court-fees accordingly, though the appellant may have paid more than adequate court-fees on the memorandum of appeal. <i>Secretary of State for India in Council v. Digambar Nanda</i>	443
Court-fees Act (as amended in 1908) Sch. I, Art. 1— <i>Memorandum of cross-objection; See Court-fee</i>	443
Court of Wards, manager of, if and when can file a suit in anticipation of sanction; <i>See Suit, maintainability of</i>	125
Court of Wards Act, Sec. 55—Suit instituted without sanction—Suit, if can proceed without Court's order; <i>See Suit, maintainability of</i>	125
Covenant—Putnidar and durputnidar—Under-tenure to be avoided on sale for arrears of rent—Transfer of Property Act, sec. 10; <i>See Lease</i>	511
— for renewal—New lease, terms of; <i>See Lease</i>	447
— for renewal—Option not stating terms of renewal—New lease, terms of; <i>See Lease</i>	443

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Criminal Procedure Code (1898), Sec. 107 (2)—Proceedings—Proceedings initiated by the District Magistrate—Person informed against, not residing within the local limits of his jurisdiction—District Magistrate, if can transfer such proceedings to a Subordinate Magistrate.	
Proceedings initiated by the District Magistrate under the special powers conferred upon him by section 107 (2) of the Code of Criminal Procedure can be transferred by him for disposal to the Court of some subordinate Magistrate otherwise competent to deal with the matter: <i>Rakhai Mandal v. The Klag-Emperor</i>	314
_____, Sec. 107 (2), proceedings under, if can be transferred to subordinate Magistrate; <i>See</i> Criminal Procedure Code, Sec. 107 (2)	314
_____, Sec. 109 cl. (a)—Applicability—Momentary effort at concealment—Person brought under arrest; <i>See</i> Security for good behaviour	38
_____, Secs. 109 cls. (a) and (b), 118—Possession of house-breaking implements, <i>See</i> Security for good behaviour	382
_____, Sec. 145—Evidence of possession—Oral evidence.	
In a proceeding under the provisions of section 145 of the Code of Criminal Procedure the trying Magistrate had not given either party any opportunity of adducing oral evidence in support of the possession which they claimed:	
<i>Held</i> , that the cardinal principle in such proceedings is that both parties must be given an opportunity of adducing such evidence as they are advised to give. <i>Sakhayet Ali Munshi v. Alhadi Hazi</i>	88
_____, Sec. 145, order under—Error committed as to conclusion drawn from evidence on record—Irrregularity; <i>See</i> Revision	465
_____, Sec. 195—'Court'—Tribunal under the Improvement Act, if a Court— <i>Calcutta Improvement Act</i> , Secs. 70, 71, 77—Sanction to prosecute.	
The Tribunal constituted under the <i>Calcutta Improvement Act</i> is a Court within the meaning of section 195 of the Code of Criminal Procedure. <i>Nando Lal Ganguli v. Khetro Mohan Ghose</i>	463
_____, Sec. 195 (6)—'Court'—Tribunal under the Improvement Act; <i>See</i> Criminal Procedure Code, Sec. 195	463
_____, Sec. 195 cls. (6) and (7)—Collector's Court, if subordinate to the Court of District Judge—Appraisement proceeding under Sec. 69 of <i>Bengal Tenancy Act</i> ; <i>See</i> Sanction to prosecute	316
_____, Sec. 234—Act forming one transaction—Additional charge—Criminal misappropriation; <i>See</i> Charges, misjoinder of	311
_____, Sec. 300—Jury, retirement of, to consider, after Judge's charge—Communication with third person, before delivery of verdict, without leave of Court—Irrregularity—Prejudice; <i>See</i> Verdict of jury	553
_____, Sec. 403—Theft— <i>Calcutta Police Act (IV B. C. of 1866 as amended)</i> , Sec. 54A.	

Criminal Procedure Code—(Contd.).

The petitioner, a dealer in jute, was found in possession of certain bales and half bales of jute. With reference to that jute he was placed on his trial on charges framed in the alternative under sections 380 and 411 of the Indian Penal Code. He was acquitted and the Court directed that the jute which was the subject matter of the charge should be returned to him. While he was removing this jute he was again arrested, the jute was again seized and a proceeding was taken under section 54A of the Calcutta Police Act :

Held, that the petitioner could not be tried a second time on the same

- facts for an offence cognate to or involved in the offences with which he was previously charged. The proceedings came within the prohibition contained in section 403 of the Code of Criminal Procedure :
Manhari Chowdhury v. King-Emperor 434

Cross-objection, memorandum of—Court Fees Act, Sch. I. Art. 1; *See* Court-fee 443

Custom—*Family custom—Burden of proof—Alleged presumption in favour of custom—Bombay Regulation IV of 1827, Sec. 26—Punjab Laws Act (IV of 1872), Sec. 5—Evidence necessary to support valid custom—Instances may be useful even though all the requisite conditions of a custom are not proved in each instance—Importance of revenue records—Mahomedan family—Inheritance—Exclusion of daughters in favour of their brothers.*

Where either party to a suit relies upon a “custom” as a rule of decision, it is incumbent upon him to allege and prove the custom on which he relies.

No presumption in favour of custom as against the general or personal law is created by clauses such as section 26 of the Bombay Regulation IV of 1827 or section 5 of the Punjab Laws Act : it is only when the custom is established that it is to be the rule of decision.

Custom binding inheritance in a particular family, although not known to English law and foreign to its spirit, has long been recognised in India, and if the custom were in fact well established in one particular family, whether it were enjoyed or no by another family would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed.

Special usages modifying the ordinary law of succession must be ancient and invariable and established to be so by clear and unambiguous evidence : Where a large number of conditions have to be fulfilled to test a custom, and a number of instances are adduced in proof of that custom, it is necessary that one or more examples of each condition should be established, but it is not necessary that all the conditions should be proved in each instance. The latter requirement would greatly weaken the evidence by tradition to which in certain cases great weight is due.

Custom—(Contd.).

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The best evidence as to custom of inheritance is generally found in connection with the division of land, if any, and the revenue records are therefore of considerable value and omission to produce them is serious. Where the question was whether there was a custom in a Mahomedan family excluding daughters from inheritance, and instances given in support of the custom showed that the excluded daughters were unmarried and living with their brothers, *held*, that such instances cannot be confidently relied upon as establishing the custom, for the position and relationship of the different members of the family must always be considered in determining whether claims were not met because the rights to which they related did not exist or whether they were put on one side because in the circumstances, there was no need that they should be asserted: *H. H. Mir Abdul Hussain Khan v. Mussammat Bibi Sona Dero* 240

—, family, if valid, *See* Custom 240

—, text of—Large number of conditions to be fulfilled—Instances may be useful even though all the requisite conditions of a custom are not proved in each instance; *See* Custom 240

— of inheritance—Evidence—Revenue records; *See* Custom 240

— of transferability subject to payment of customary *nasar*—*Nasar*, nature of; *See* Occupancy holding 587

Damages—Basis of calculation—Dispossession of putnidar by zemindar; *See* Chowkidari Chakran land. 494

Decision on surmises and conjectures; *See* Second appeal 563

Declaratory decree—*Alienation by a Hindu widow—Next reversioner—Declaration involving a finding that the claimant is the next reversionary heir—Specific Relief Act—(I of 1877), section 42, illustration (e).*

Where any deed is executed by the widow of a sonless Hindu, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events preclude them from doing so, may, under the Specific Relief Act, section 42, illustration (e), have a declaration as to the effect of the deed, notwithstanding the fact that the declaration given involves a finding that the person in whose favour it is made is a reversionary heir. *Saudagar Singh v. Pardip Narayan Singh* 186

Declaratory suit—*Specific Relief Act (I of 1877), secs. 42, 43—Declaration that marriage invalid—Suit by Mahomedan mother and certificated guardian.*

A suit for a declaration by a Mahomedan mother and certificated guardian that a ceremony purporting to be a ceremony of marriage between the plaintiff's daughter and the defendant was not duly performed and was invalid, is not maintainable under section 42 of the Specific Relief Act.

Soonalla Bibi v. Tula Bibi 603

Decree, final, for partition, execution of—Preliminary decree set aside; *See* Restitution 451

Decree, final, for partition pending appeal, effect of—Preliminary decree set aside; <i>See</i> Restitution	451
—, form of—under raiyat, death of—Suit instituted before expiry of agricultural year; <i>See</i> Ejectment	579
• —, if can be challenged collaterally; <i>See</i> Receiver	395
—, nature of—Head of the family dealing with entire estate—Head of the family not competent to bind other's shares; <i>See</i> Specific performance	611
—by consent, setting aside of, by another decree, effect of; <i>See</i> Suit, trial of	592
Devolution—Grants to the holder of an office for religious as well as non-religious purposes—Surrounding circumstances—Construction; <i>See</i> Hindu Law—Grant	231
Directors of a Joint Stock Company, if liable to conviction—Default in filing with the Registrar of Companies an audited annual balance sheet—No general meeting of the members; <i>See</i> Company	85
Discretion, how to be exercised—Rule; <i>See</i> Costs	78
Dissolution, right to, how far affected by terms of partnership contract—Power of Court to decree dissolution—Contract Act, Secs. 252, 253, 254; <i>See</i> Partnership	623
Document, impounding of—Document, not basis of suit—Document produced with another document, basis of suit—Stamp Act (I of 1899) Sec. 33. The petitioners instituted a suit for recovery of money due on a <i>hatchitta</i> . The <i>hatchitta</i> was in a bound volume which contained a large number of <i>hatchittas</i> executed by other persons in favour of the plaintiffs. The entire volume was brought into Court when the plaint was filed. The plaintiffs prayed that the particular <i>hatchitta</i> , whereon his claim was founded, should be detached, and placed on the record, and the remainder of the volume should be returned to them. An examination of the <i>hatchitta</i> , which was the foundation of the suit disclosed that it was not properly stamped. The Court examined the other <i>hatchittas</i> in the volume and came to the conclusion that the other documents were not properly stamped. It accordingly impounded all the <i>hatchittas</i> under section 33 of the Stamp Act: <i>Held</i> , that the Court was incompetent to impound the <i>hatchittas</i> on which the claim of the plaintiffs was not founded. <i>Sasi Mohan Saha v. Kamud Kumar Biswas</i>	525
Documentary evidence—Not produced at the date of hearing—case adjourned—Civil Procedure Code, O. 17 R. 2; <i>See</i> suit, hearing of	119
Eastern Bengal and Assam Disorderly Houses Act, Sec. 3, proceedings under if can be interfered with by District Magistrate; <i>See</i> jurisdiction	89
Ejectment—A person who has already acquired an occupancy right, if loses such right by obtaining a grant of fixed rent—'Protected interest'; <i>See</i> Revenue Sale Law, Sec. 37 Proviso	284
—Lease, forfeiture of—Rent, non-payment of—Rent for two consecutive years—Waiver—Transfer of Property Act (IV of 1882), Sec. 111 (g)—Overt act—Institution of suit.	

Ejectment—(Contd.).

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If rent is claimed for two consecutive years, ejectment cannot be decreed on the ground of forfeiture incurred at the end of the first year, because the very fact that rent is claimed for the second year, shows conclusively that the forfeiture, if any, incurred at the end of the first year, has been waived by the landlord.

Where the rights and obligations of the parties are regulated by section 111 (g) of the Transfer of Property Act, there is no determination of a lease by forfeiture, immediately on breach of covenant, but the lessor is required to do some act thereafter showing his intention to determine the lease : in other words, the breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law.

Institution of a suit for ejectment is not regarded as a requisite act to show an intention of a landlord to determine the lease within the meaning of section 111(g) of the Transfer of Property Act. The forfeiture must be complete and the lease must be determined before the commencement of action for ejectment. The act, however, need not be a formal notice to quit, and may be a demand for possession, oral or written : what is essential is an overt act, which intimates to the tenant the intention of the landlord to determine the lease. *Nowrang Singh v. Janardan Kisor Lal Singh Deo* 277

— *Under-raiyat—Interest, if heritable—‘Kayemi’—‘Sthayee Karsha’—Decree, form of—Raiyat at fixed rate, if can create permanent heritable interest.*

The interest of an under-raiyat is not heritable.

Where a suit was instituted before the expiry of the agricultural year current at the time when the original under-raiyat dies, the proper form of the decree would be one for ejectment against his representatives, to be executed only on the expiry of that particular agricultural year.

An occupancy raiyat is not competent to create a permanent heritable under-raiyati interest.

The use of the word ‘*Kayemi*’ imports not fixity of rent, but only permanence of occupation of the land.

A description of the *Kabuliat* as “*Sthayee Karsha*” *kabuliat* does not necessarily imply that the grantee was intended to have a permanent heritable interest.

Obiter. A raiyat holding at a fixed rate of rent is competent to create a permanent heritable interest in favour of his grantee, although the latter was an under-raiyat. *Meher Ali v. Kalal Khalasi* 579

—, *suit for—License, if entitled to a notice to quit.*

A licensee in possession of lands is not entitled to a notice to quit.

Gobinda Chandra Ghose Biswas v. Nanda Dulal Sut 523

— of non-occupancy raiyat, decree for—Decretal amount, by whom to be paid—Payment, if can be made by under-raiyat ; See Bengal Tenancy Act, Sec. 66 Cl. (2) 478

Entry, incorrect—Bengal Tenancy Act, Sec. 103 B sub-sec (3)—Mode of proof ; <i>See</i> Admissibility in evidence... ..	107
—, incorrect—Bengal Tenancy Act, Sec. 103 B sub-sec. (3)—Entry not supporting conclusion ; <i>See</i> Admissibility in evidence	107
<i>Erroneous admission by Counsel on point of law, effect of.</i>	
An erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the appellate Court : <i>Secretary of State for India in Council v. Sibaprasad Jana</i>	447
Error of law, if divests Court's jurisdiction ; <i>See</i> Receiver	395
Estoppel—Misrepresentation by some of the mortgagees—Transfer of Property Act, Sec. 78 ; <i>See</i> Mortgage	453
—Mortgage executed by widow and next reversioner—Decree against both—Application for execution against both—Objection as to interest after period of grace by widow—Widow, death of, pending execution—Next reversioner, if can raise same objection subsequently ; <i>See</i> Mortgage decree	576
—Non-transferable holding—Sale in execution of rent decree—Application to set aside sale—Civil Procedure Code (Act XIV of 1882), Sec. 310A—Deposit by purchaser at private sale—Withdrawal of money by landlord.	
On the 25th April, 1903, the landlord in execution of a decree for arrears of rent against the recorded tenant purchased a non-transferable holding. On the 25th May, 1913, the second defendant made a deposit under section 310A of the Code of Civil Procedure of 1882, with a view to the cancellation of the sale, alleging that he had purchased the holding from the admitted tenant on the 4th September, 1900. The Court directed that the decree-holder auction-purchaser be called upon to show cause why the deposit should not be accepted. The sale was soon after set aside and on the 29th May, 1903, an application was made on behalf of the decree-holder for leave to withdraw the amount in deposit. The application was granted and the money was paid out in due course ;	
<i>Held</i> , that the landlord, the decree-holder and auction-purchaser, could not be permitted to urge that the sale to the defendant was inoperative. <i>Gadadhar Ghose v. Midnapore Zemindari Co.</i>	385
—suit by puisne mortgagee—Puisne mortgagee not attacking sale in prior mortgagee's suit ; <i>See</i> Revenue sale	303
Evidence—Custom of inheritance—Revenue records ; <i>See</i> Custom... ..	240
Evidence—Custom of transfrability subject to payment of customary <i>nazar</i> ; <i>See</i> Occupancy holding	587
—Decree recording agreement as one of the terms of compromise—Agreement about matter not relating to suit ; <i>See</i> Res judicata	583
— <i>Mal land</i> —Purchaser of an entire estate—Revenue sale.	
The purchaser of an entire estate at a revenue sale takes the estate as created at the time of the Permanent Settlement. Merely because the lands are situated within the geographical limits of the estate purchased, it cannot be said that they were <i>mal</i> lands and formed part of the zemindari at the time of the Permanent Settlement. The auction-purchaser	

Evidence—(Contd.).	PAGE.
must prove that the revenue was assessed on the basis of the assets of those lands. <i>Abdul Rahaman Kazi v. Balkantha Nath Roy Chowdhury</i> ...	133
—Transferee recognized on payment of satisfactory <i>nazar</i> ; <i>See</i> Occupancy holding ...	587
—, admissibility of—Agreement, unregistered, recorded in compromise decree—Agreement forming consideration for compromise; <i>See Res judicata</i> ...	583
—, admissibility of— <i>Deposition not read over to witness—Evidence Act (I of 1872), Secs. 80, 91—Civil Procedure Code (Act V of 1908), O. 18, Rr. 5, 6.</i>	
A provision requiring a deposition to be read over to a witness is in its nature directory and if it were not complied with in a particular case, the deposition while it may lose the benefit of section 80 of the Evidence Act, may be proved in some other way.	
<i>Per Beachcroft J.</i> : The object of the provision in Order 18 of rule 5 of the Code of Civil Procedure requiring a deposition to be read over to a witness, is to ensure accuracy. <i>Elahi Baksha Kazi v. King-Emperor</i> ...	377
—, admissibility of— <i>Evidence Act (I of 1872), sections 24, 25, 26, if qualified by section 27 of the Act—Information received from accused, admissibility of—Confession recorded by the Magistrate—Confession, verification of, by the Magistrate—Additional incriminating statements by the accused, during the verification, if admissible in evidence—Procedure of verification of confession by the Magistrate in the presence of the accused, propriety of—Charge to the jury, how to be expressed.</i>	
Section 24 of the Indian Evidence Act does not control section 27 of the Act.	
Under section 27 of the Act, if a single statement made by an accused person contains more information than what is contemplated in section 24, the statement is not to go in as a whole nor is to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery.	
A Magistrate after recording the confession of the accused in the regular manner took the accused with him to various places referred to in the confession for purposes of verification, and in the course of such verification the accused was said to have supplemented his former recorded confession by other statements of an incriminating nature; and the Magistrate was allowed at the trial to depose to these other statements of the accused though they were never recorded at any time under section 164 of the Code of Criminal Procedure:	
<i>Held</i> , that these additional statements could not be used as evidence against the accused.	
The propriety of the procedure of the verification of confession by the Magistrate himself in the presence of the accused discussed.	
A Sessions Judge in his charge to the jury should avoid as far as may be the use of expressions which assume the guilt of the accused. <i>Amlrudin Ahmed v. King-Emperor</i> ...	148

Evidence, *admissibility of*—*Witnesses—Co-accused, competency of—Complicity in same matter—Joint trial—Separate trial—Indian Oaths Act (X of 1873), section 5—Criminal Procedure Code (Act V of 1898), section 342, Cl. (4).*

Although the Evidence Act is silent as to competency of accused persons as witnesses yet in view of the provisions of section 5 of the Indian Oaths Act and section 312 Cl. (4) of the Criminal Procedure Code an accused person actually under trial cannot be sworn as a witness, and that if two or more persons are being *jointly* tried none of them is a competent witness for or against the others. But if two persons accused of complicity in the same matter are tried *separately* each is a competent witness at the trial of the other. *Akhoy Kumar Mukerjee v. King-Emperor* ... 91

— necessary to support valid custom ; *See* Custom ... 240

— of possession ; *See* Criminal Procedure Code, Sec. 145 ... 88

Evidence Act—Section 24, if controlled by Sec 27 ; *See* Evidence, *admissibility of* ... 148

—, Sec. 27—Statement by accused person—Statement contains more information than what is contemplated in Sec. 24—Statement, how far admissible ; *See* Evidence, *admissibility of* ... 148

—, Sec. 92—English equity doctrine, if applicable ; *See* Evidence Act, Secs. 98, 99 (... 175

—, Sec. 92—Oral evidence, where inadmissible—Intention—Acts and conduct of parties ; *See* Evidence Act, Secs. 98, 99 ... 175

—, Sec. 92, applicability of—Transaction with a third party ; *See* Evidence Act, Secs. 98, 99 ... 175

— (*I of 1872*), Secs. 98, 99—*Construction—Absolute conveyances, alleged to be transfers of mortgages—Whether evidence in proof of such allegation may be given—Dealings with a third person's property—Evidence of notice of third person's title.*

Respondents sued for possession under deeds purporting to be absolute conveyances. Appellants tendered evidence to show that to the respondent's knowledge the properties belonged to a third person who had mortgaged them to appellants and that the deeds were intended to operate only as transfers of the mortgages.

Held, that such evidence was admissible.

Section 92 of the Indian Evidence Act, which excludes evidence contradicting the terms of written instruments, in terms applies only "as between the parties to any such instrument or their representatives in interest." Whenever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such case the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions.

Held, also, that if section 92 applied, proviso 1 to that section, would admit the evidence, because it would be a fraud to insist upon a claim to property arising out of such a transaction, the claimant knowing that the true owner had never parted with it.

Evidence Act—(Contd.).

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In cases to which section 92 is applicable, the English equity doctrine as expressed by Lord Justice Turner in *Lincoln v. Wright* and followed in a long series of Indian cases was definitely excluded in India by the decision in *Balkishan Das v. Legge*. The law is that oral evidence is not admissible for the purpose of ascertaining the intention of parties to written documents, and though attempts have been made to engraft an exception on this rule in favour of evidence relating to the acts and conduct of the parties, it is now settled that such evidence is inadmissible. *Maung Kyn v Ma Shwe La* 175

—, Sec. 106—Negligence of bailee or his servants; *See* Contract Act, Secs. 151, 152 615

Execution—*Application in accordance with law—Property specified in list could not be proceeded against—Application to proceed against fresh property, if to be granted—Continuance—Civil Procedure Code (Act V of 1908), O. 21, rr. 13, 17 (2).*

A rent decree was obtained on the 28th November, 1911. An application for execution was made on the 23rd November, 1914. This application was in accordance with law. Later, on objection taken by the judgment-debtors, it was discovered that against the properties specified in the list furnished under order 21, rule 13 of the Code of Civil Procedure, proceedings could not be taken and accordingly on the 14th January, 1915, the decree-holder made an application to the Court requesting the Court to accept a further list of properties and praying that execution should proceed by attachment and sale of those properties :

Held, that it was open to the decree-holder to ask the Court to proceed against the properties specified in his further and supplementary list and that list was part of the original application under the provisions of order 21, rule 17 (2) of the Code of Civil Procedure. That if a fresh application were necessary, that application was made in continuance of the application first presented on the 23rd November, 1914.

Gnanendra Kumar Rai Chowdhury v Sree Sree Shyam Sundar Jlu ... 398

—Assignee of mortgage decree judgment-debtor; *See* Mortgage decree 110

—proceedings fraudulently suppressed—Civil Procedure Code, Sec 47; *See* Execution sale 528

Execution sale—*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—'Dispossession'—Landlord purchaser—Omission to serve notice under O. 21, R. 22 of the Code of Civil Procedure (Act V of 1908), effect of—Process for execution fraudulently suppressed—Civil Procedure Code (Act V of 1908), Sec. 47—Limitation Act (IX of 1908), Sec. 18, Sch. I, Art. 181—Burden of proof.*

Where a landlord, in execution of a decree for arrears of rent, puts a holding to sale, purchases it himself and obtains delivery through Court, such dispossession of the tenant is not dispossession within the meaning of article 3, Schedule III of the Bengal Tenancy Act :

Execution sale—(Contd.).

- The omission to serve a notice under Order 21, rule 22 of the Code of Civil Procedure is by itself sufficient to render an execution sale void for want of jurisdiction : for the notice is the very foundation of the jurisdiction :
- Where every process prescribed by the legislature with a view to apprise the judgment-debtors or their representatives that execution was to proceed against them had been fraudulently suppressed : *Held*, that such a case was governed by section 47 of the Code of Civil Procedure, and the period of limitation was that provided by article 181 of the first schedule to the Limitation Act. To such a case, section 18 of the Limitation Act applied.
- The burden rests upon the person, who has committed a fraud, to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to seek the assistance of the Court : *Ram Kinkar Tewari v. Sitliti Ram Panja* 528
- , void—Omission to serve notice under O. 21 R. 22 of the Code of Civil Procedure : *See* Execution sale 528
- Ex parte decree, setting aside of, by another decree, effect of ; *See* suit, trial of
- order admitting appeal out of time—Order, if can be set aside at hearing—Question of limitation, when can be finally determined, *See* Limitation 253
- Fact, question of—Possession of a part of the disputed property, if evidence of the whole ; *See* Revision... .. 465
- False information, suspecting a person, if amounts to—Complaint of Police ; *See* Penal Code, Sec. 182 230
- Family custom, if valid : *See* Custom 240
- Fraudulent behaviour, effect of ; *See* Revenue sale 303
- decree—Suspicious circumstances about fraud ; *See* Burden of proof 137
- Full Bench, reference to, validity of ; *See* Recoupment 1
- Ghatwal, mortgage by—Property inalienable but subsequently became alienable ; *See* Mortgage 289
- Ghatwall land—Occupancy right, acquisition of—*Bengal Tenancy Act (VIII of 1885) Secs. 19, 181.*
- From 1859 to 1885 ghatwali lands were subject to the acquisition of occupancy right. Section 181 of the Bengal Tenancy Act does not take away such rights acquired or enjoyed. *Sitkanta Roy v. Bipradas Charan* ... 556
- Gift—*Mahomedan Law—Invalid condition.*
- The ordinary rules applicable to gifts apply to the Mahomedan law like any other system of law and one of these rules is that a gift is not invalidated by an invalid condition being attached to it. *Neamatunnessa Bibi v. Golam Panchaton Kazi* 502
- , if valid—Invalid condition attached to gift—Mahomedan law ; *See* Gift 502
- , if valid, of non-transferable occupancy holding ; *See* Occupancy holding 497
- , when revocable ; *See* Occupancy holding 497
- by karta—Blending of self-acquired and joint funds—Issue as to joint or separate estate ; *See* Hindu law—Mitakshara joint family 632

Government of India Act, Sec. 107—Material irregularity—Magistrates's refusal to look into documentary evidence—Title, evidence of ; <i>See</i> Revision ...	365
—————, Sec. 107—Order made by District Judge under section 33 of the Bengal Civil Courts Act ; <i>See</i> Revision ...	477
Grantee, if has a permanent heritable interest— <i>habuliat</i> , description in, as <i>Sthayee karska</i> ; <i>See</i> Ejectment ...	579
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Guardian, certificated, transferring minor's interest without the leave of the District Judge, if valid ; <i>See</i> Mortgage decree ...	110
———— cannot deal with his ward's reversionary right ; <i>See</i> Reversioner ...	296
High Court, if can interfere—Wrong decision based on mistake of fact ; <i>See</i> Revision ...	418
————, when can interfere with the order of acquittal, at the instance of private party ; <i>See</i> Revision ...	226

Hindu Law—*Adoption*—*Anti-adoption agreement between adoptive mother and natural father, if binding on the minor*—*Contract, if void.*

Anti-adoption agreements by the adoptive mother with the natural father and operating in the restriction of the rights of the adopted son are valid only if they amount to fair and reasonable arrangements for the enjoyment of her husband's property by the widow during her life-time, especially when there is authority from the husband in that connection. The contract is not, however, absolutely void and can be ratified by the minor : *Panchanan Majumdar v. Binoy Krishna Banerjee* ...

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—————*Grants*—*Charitable purposes*—*Management of private and public charities*—*Devolution of management must be consistent with the purpose of the founder*—*Grants to the holder of an office for religious as well as non-religious purposes*—*Construction*—*Surrounding circumstances*—*Devolution*—*Partition*—*Impartibility of the headship of muti*—*jurisdiction of the Court to order a scheme for management.*

With regard to the management of private charities, such as endowments for the support of the family idols, the law is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition, or in turn by the several heirs after partition :

Quare, Whether this rule applies to public charities such as lands endowed for charitable purposes by a sovereign ruler :

But where a grant of land is made to the grantee for religious purposes and there is sufficient indication in the documents and in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowment, the management should not devolve on those heirs generally.

Hindu Law—(Contd.).

A Hindu sovereign granted certain lands to one S, his *guru*, some without condition and others for religious purposes. The original *guru*'s descendants in regular succession filled his office and enjoyed or managed the properties. The Raj was escheated, but on the death of the last *guru*, (who was the first to have more than one son), leaving three sons, the eldest was installed as *guru* by the man claiming to be the adopted son of the late Rajah, and one of his younger brothers thereafter sued for a share in the non-religious properties and in the management of the religious properties :

Held, that as regards the non-religious lands there was nothing to take their descent out of the ordinary rule of inheritance, and that the plaintiff was entitled to a decree for partition thereof ; but that as regards the religious lands the documents and the surrounding circumstances sufficiently indicated the founder's intention that they should be administered by the *guru* as the head of the *mutt*, an office not divisible among the members of the family, and that being so, there was no jurisdiction in the Indian Court to settle the scheme, the only object of which would be to take away the sole power of management from the eldest son, and that the plaintiff's claim to share in the management must be dismissed : *Sri Sethuramaswamiar v. Sri Meruswamiar*

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—*Joint family—Mitakshara—Self-acquired property—Gains obtained from science or learning.*

Although the Mitakshara lays down that "what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brother and with the father" this does not apply to gains which are the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person educated at the expense of the joint family. There is no authority in the Mitakshara for the contention that gains made personally and without the aid of joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of a family to which he belonged should in law be regarded as partible and not as his self-acquired property. *Metharam Ramrakhlomal v. Rewachand Ramrakhlomal*

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—*Mitakshara joint family—Issue as to joint or separate estate—Blending of self-acquired and joint funds—Gift by Karta.*

D, a Mitakshara separated brother was acting as guardian of his minor brother K. On partition each of them got some ancestral properties ; after partition a son was born to D and subsequently some property came to the brothers from the estate of a deceased brother. Only one account book was kept of their joint share of the latter property, and that system of book-keeping, which began in October 1878, was continued till February 1880, when K came of age. No separate book was thereafter kept by or for D with respect to the properties which had come

Hindu Law—(Contd.).

to him from his deceased brother's estate, but there was one account for all *D*'s receipts from all sources, whether it was income from joint ancestral family property or from that which he had acquired from his deceased brother's estate or any other source of revenue, and similarly for all his expenditure of whatever kind. Further, on "*deork* partition" that is an actual partition of the several properties constituting their estates, mutual exchanges were made whereby *D* gave up his share in some ancestral family property for the share of *K* in the property acquired from the brother's estate, and *vice versa*. In a suit by *D*'s son and grandson (the appellants) after the death of *D* to set aside deeds of gift made by *D* in favour of the respondents on the ground that they had been made out of the joint ancestral property and was therefore invalid :

Held, (reversing the High Court) that the property coming from the brother's estate as collateral heir was *D*'s self-acquired property ; that by blending that property with the joint ancestral property in the accounts and by the said mutual exchanges *D* had thrown it into the common stock, and thereby converted it into joint ancestral family estate ; and that all the properties purporting to be conveyed to the respondents by the deeds of gift were joint family properties over which *D* had no power of disposition and the appellants were entitled to recover them. *Radhakant Lal v. Mussammat Nazma Begum* ...

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Mortgage—Mitakshara—Mortgage of joint property by a manager who is not the father—Burden of proving necessity—Whether a mortgage of joint property without necessity binds mortgagor's own share.

The mortgage of joint estate made by the manager of a joint family governed by Mitakshara, who is not the father of the other members, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence, it may be assumed, if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof is on the person who claims the benefit of the mortgage.

If the mortgage debt was not incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of such a mortgage :

When the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent to which necessity has been proved.

A zemindar, manager of a Mitakshara joint family, mortgaged their joint villages for Rs. 3,000 to pay Government revenue. The lender suing on the mortgage, other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1,698 odd were actually paid as revenue of ten of the villages out of the money lent, but no evidence was given as to the disposal of the balance :

Held, that the mortgage was enforceable to the extent of Rs. 1,698 only against the joint villages ; and that as regards the balance, not even the

Hindu Law—(Contd.).

• mortgagor's own share in these villages was bound. <i>Anant Ram v. The Collector of Etah</i>	363
• Impounding of document—Document, not basis of suit—Document produced with another document, basis of suit—Stamp Act, Sec. 33 ; <i>See</i> Document	525
Inconsistent position— <i>Detrimental</i> .	
Parties litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents. <i>Girls Chandra Bli v. Bepin Behary Khan</i>	535
Incriminating statements by accused, additional, during verification, if • admissible in evidence ; <i>See</i> Evidence, admissibility of	148
Inherent power ; <i>See</i> Remand	596
Inheritance—Mahomedan family—Exclusion of daughters in favour of their brothers ; <i>See</i> Custom	240
—, forfeiture of—Kittima son—Separation ; <i>See</i> Burmese Buddhist Law	68
Injunction, prohibitory, embodied in decree—Remedy—Civil Procedure Code, O. 21, R. 32 ; <i>See</i> Suit, if lies	506
—, prohibitory, embodied in decree, enforcement of ; <i>See</i> Suit, if lies	506
Inquisition order, wife's brother, if competent to apply for ; <i>See</i> Lunacy Act, Secs. 3 (11), 63	205
Interest, further—Proper period after period of grace ; <i>See</i> Mortgage decree	576
Joint Hindu family—Karta, power of—Non-transferable occupancy holding, transfer of—Recognition of transfer by karta, if binds other members of the family.	
A consent given by the karta of a joint Hindu family to a transfer of a non-transferable occupancy holding, held by the tenants under the joint family as landlords, is binding on other members of the family. <i>Golapdi Meah v. Purno Chunder Dutt</i>	129
Joint landlords—Suit for recovery of arrears of rent and for apportionment of rent ; <i>See</i> Suit, if lies	438
Jotes, non-transferable—Nazar, payment of ; <i>See</i> Occupancy holding	587
Judge, duty of—Jury-trial ; <i>See</i> Verdict of jury	553
Judgment debt, if extinguished—Pleader of the judgment-debtor purchasing decree from decree-holder ; <i>See</i> Pleader and client	388
Judgment-debtor, assignee of mortgage decree, if can execute ; <i>See</i> Mortgage decree	110
Judicial order—Order made by District Judge under section 33 of the Bengal Civil Courts Act ; <i>See</i> Revision	477
Jurisdiction—Appeal, hearing of ; <i>See</i> Appeal	115
—Bengal Tenancy Act (VIII of 1885), Sec. 40, Sub-sec. (3)—Civil Court, if competent to examine the propriety of an order—Application, who should determine—Transfer, if valid.	
A Civil Court is not competent to examine the propriety of an order of commutation made with jurisdiction ; in other words, a Civil Court	

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cannot determine whether, in the circumstances of a particular case, commutation was or was not properly directed ; or whether the amount assessed as cash rent is or is not adequate : But if a question of jurisdiction arises, it is incumbent upon the Civil Court to satisfy itself that the order is made with jurisdiction ; for an order made without jurisdiction, is a nullity and does not affect the rights and obligations of the parties:

An application to have the rent commuted to money rent should be entertained and determined on the merits by the officer to whom it was presented by the applicant. The 'officer' mentioned in sub-section 3 of section 40 of the Bengal Tenancy Act is the officer who received the application from the applicant. Consequently the Sub-Divisional officer cannot transfer an application received by him to a Settlement officer.

Jadu Nath Manna v. Pran Krishna Das 569

—Civil Court, if can enquire into status of a tenant—Record-of-rights showing status of tenant ; See Suit, maintainability of ... 210

—Court, if can order a scheme of management—Religious and non-religious lands ; See Hindu Law—Grant. ... 231

—*Eastern Bengal and Assam Disorderly Houses Act (II of 1907, E. B. and A) Sec. 3, proceedings under—Order passed by the enquiring Magistrate, if can be modified by the District Magistrate.*

A District Magistrate has no jurisdiction to interfere with an order passed by a criminal Court in the exercise of its jurisdiction under section 3 of the Eastern Bengal and Assam Disorderly Houses Act. Lalit Mohan Chakrabarty v. Harendra Kumar De 89

—*Small Cause Court—Suit for compensation for acts which are offences—Provincial Small Cause Courts Act (IX of 1887 as amended by Act VI of 1914), Schedule II, Art. 35—Jurisdiction, absence of—Higher Court, duty of.*

A suit for compensation for wrongfully cutting a tree grown, and misappropriating crops raised, by the plaintiff on his land, is excepted from the cognizance of a Court of Small Causes by article 35 sub-clause (ii) of the second schedule to the Provincial Small Cause Courts Act.

When there is an entire absence of jurisdiction, no action on the part of the plaintiff, no inaction on the part of the defendant, can invest the Court with jurisdiction, for jurisdiction cannot be created by waiver or consent and when a subordinate tribunal has usurped jurisdiction, it is incumbent on the Court of appeal or revision to interfere ; Ramaprosad Paramanick v. Sricharan Mandal 594

—, absence of—Waiver—consent ; See Jurisdiction 594

—, what is ; See Receiver 395

—of a single Judge to amend judgment and decree—Appeal heard by Division Bench of High Court ; See Review 326

Jury, charge to, how to be expressed ; See Evidence, admissibility of ... 148

Jury, retirement of, to consider, after Judge's charge—Communication with third person, before delivery of verdict, without leave of Court—Irregularity—Prejudice—Criminal Procedure Code, Sec. 300 ; <i>See</i> Verdict of jury	...	...	...	...	553
Jury-trial—Judge, duty of ; <i>See</i> Verdict of jury	...	...	...	...	553
Kabullat, description in, as <i>Sthye Karsha Kabulliat</i> —Grantee, if has a permanent heritable interest ; <i>See</i> Ejectment	...	...	...	...	579
Karta, power of—Recognition of transfer of non-transferable occupancy holding by Karta, if binds other members of the family ; <i>See</i> Joint Hindu family	...	...	...	...	129
Kayeml, meaning of—Fixity of rent—Permanence of occupation ; <i>See</i> Ejectment	...	...	...	...	579
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Land, compulsory acquisition of, by Board of Trustees ; <i>See</i> Recoupment	...	...	...	...	1
Landlord, withdrawal of money by—Sale in execution of rent decree of non-transferable holding—Application to set aside sale—Civil Procedure Code, Sec. 310A—Deposit by purchaser at private sale ; <i>See</i> Estoppel	...	...	...	...	385
— and tenant—Land, in possession of tenant—Trees belonging to Landlord, cut and appropriated by tenant—Kabullat—Stipulation to pay compensation, if tenant cuts trees ; <i>See</i> Theft	...	...	...	...	228
— and tenant—Non-transferable holding—Sale in execution of rent decree—Application to set aside sale—Civil Procedure Code, Sec. 310A.—Deposit by purchaser at private sale—Withdrawal of money by landlord ; <i>See</i> Estoppel	...	...	...	...	385
Land Registration Act, Sec. 78—'Malikana' in putni lease—Rent in essence—'Malikana' recoverable by summary procedure under Putni law ; <i>See</i> Rent, suit for	...	...	...	...	474
—, Sec. 81—'Written contract'—Contract between person bound to pay rent and the usufructuary mortgagee of the proprietor ; <i>See</i> Rent, suit for	...	...	...	...	474
Land Tenure in Bengal— <i>Tenure-holder or raiyat</i> —Area exceeding 100 standard bighas—Presumption that the tenant is a tenure-holder—Purpose for which the lease is granted—Cultivation by sub-lessee—Bengal Tenancy Act (VIII of 1885) Sec. 5 Sub-secs. (1), (4) and (5).					
Defendant was assignee of a reclamation lease of over 100 standard bighas of land granted by plaintiff's predecessor for cultivation, without any restrictions as to the agency to be employed in such cultivation.					
<i>Held</i> , that, under the circumstances, of the case, the presumption arising under sub-section (5) of section 5 of the Bengal Tenancy Act that the tenant was a tenure-holder and not a raiyat, since the area exceeded 100 standard bighas was not rebutted by referring under sub-section 4(b) of the same section to the purpose for which the right of tenancy was originally acquired. Debendra Nath Das v. Bibhudendra Manan Singh Bhramarbar Roy	...	...	...	...	543
Law, error of, if divest Court's jurisdiction ; <i>See</i> Receiver	...	...	...	...	395

Lease—Construction—Covenant for renewal.

A settlement was made with the predecessor of the plaintiff for a term of 22 years on a progressive rate of rent from 1285 to 1306. The *kabuliat* executed by the grantee contained a covenant to the following effect: "If I agree to the enhancement of rent to be fixed at the time of the next settlement in future, the Government shall have the power to settle the lands with me, or if I do not agree, then with others":

Held, that the clause in the lease was in essence a covenant for renewal.

That the lessee was entitled at the expiration of the term to obtain a renewal of the lease on the same terms as were contained in the original lease, except as to the amount of rent and the covenant for renewal:

Secretary of State for India in Council *v.* Sibaprosad Jana ... 447

—Contract for variation of rent payable in respect of lease; *See* Admissibility in evidence ... 107

—Covenant for renewal.

Where there is a covenant for renewal, if the option does not state the terms of renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for renewal itself. Secretary of State for India in Council *v.* Digambar Nanda ... 441

—*Durputni—Covenant—Under-tenure to be avoided on sale—Bengal Tenancy Act (VIII of 1885), Secs. 159 proviso, cl. (b), 167, 179—Transfer of Property Act (IV of 1882), Sec. 10.*

Section 179 of the Bengal Tenancy Act controls clause (b) of the proviso to section 159.

It is competent for the putnidar and durputnidar to enter into a contract of permanent tenancy, subject to the restriction that subordinate interests carved out by durputnidar will be extinguished on a sale of his under-tenure for arrears of rents. This restriction runs with the land, and is operative not only between the grantor and the grantee, but also between their representatives in interest and holders of derivative titles from them. The condition in the lease is not an absolute restraint on alienation, and is for the benefit of the lessor. *Madhu Sudan Mahato v. Midnapur Zemindari Co.* ... 511

—, construction of—Covenant for renewal; *See* Lease ... 447

—, determination of, by forfeiture—Intention—Institution of suit; *See* Ejectment ... 277

—, forfeiture of—Rent, non-payment of, for two consecutive years—Rent, claim of—Waiver; *See* Ejectment ... 277

—, new, terms of—Covenant for renewal; *See* Lease ... 447

—, new, terms of—Covenant for renewal—Option not stating terms of renewal; *See* Lease ... 443

Letters Patent, cl. (15)—Appeal against an order of senior Judge, if lies—Judgment materially affecting the merits of the question between the parties—Auction sale, confirmation of; *See* Revision ... 418

Letters Patent, cl, (15)—Order deciding in substance question of jurisdiction—	
Dismissal of suit on the ground of misjoinder of parties and causes of action—'Like nature' with defect of jurisdiction ; See Appeal ...	158
Licensee in possession of land, if entitled to a notice to quit ; See Ejectment, suit for ...	523
Limitation— <i>Adverse possession</i> — <i>Symbolical possession when sufficient to interrupt adverse possession.</i>	

Symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution proceedings in which the symbolical possession was given. Thakur Sri

Sri Radha Krishna Chanderji v. Ram Bahadur ...	191
—Bengal Tenancy Act (VIII of 1885), Sec. 104 H, suit under— Period, extension of—Limitation Act (IX of 1908), Sec. 15 (2)—Bengal Tenancy Act (VIII of 1885), Secs. 184, 185.	

Section 15, sub-section (2) of the limitation Act, does not extend the period of six months mentioned in section 104H, sub-section (2) of the Bengal Tenancy Act.

Section 15 sub-section (2) of the Limitation Act, which is made applicable to suits, appeals and applications mentioned in the third schedule annexed to the Bengal Tenancy Act, by virtue of section 185, sub-section (2) does not apply to suits instituted under section 104H of the Bengal Tenancy Act, which are not mentioned in the third schedule : Secretary of state for India in Council v. Gangadhar Nanda ...

—Interest, payment of—Limitation Act (IX of 1908), Sec. 20—'Interest paid as such.'	374
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In order to bring a case within section 20 of the Limitation Act, it is not essential that the debtor should, on the occasion of every payment, state explicitly that the payment is made on account of interest as such ; it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. Charu Chandra Bhattacharjee v. Karam Bux Sikdar ...

—Indian Limitation Act (XV of 1877), Secs 4, 5—Ex parte order admitting appeal out of time—Such an order set aside at hearing— Jurisdiction—Practice—Stage at which the question of Limitation should be finally determined after due notice to all parties.	141
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The admission of an appeal on an *ex parte* application of the appellant, under section 5 of the Indian Limitation Act, after the expiry of the period of limitation prescribed therefor under section 4, deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour, and consequently such an order is open to reconsideration at the respondent's instance.

The question of limitation should not however be left open till the hearing of the appeal, though this may have hitherto been the practice in India. The Courts in that country should adopt a procedure which will secure

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Limitation—(Contd.).	
at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of an appeal,	
The order of a Divisional Bench of the Madras High Court was upheld that at the time of hearing an appeal it had jurisdiction to set aside an <i>ex parte</i> order made by a single Judge of that Court admitting an appeal out of time. <i>Krishnasami Panikondar v S. R. M. A. R. Ramasami Chettiar</i>	253
—Limitation Act (IX of 1908), Secs. 6, 30, Sch. I, Art. 135—Shebait—Suit to recover debutter property—Permanent lease—'Transferred'—Time, running of.	
A suit by a shebait in 1913, to recover possession of debutter property held by the defendant under a <i>makarrari</i> lease granted by a previous shebait in 1876, is barred by the provisions of Art. 134, Sch. I of the Limitation Act, as brought more than 12 years after the date of the lease.	
The representation of an idol by shebait is a continuing representation and limitation runs against the idol continuously and not against each shebait individually as and when he succeeds to the office, the shebait not being holders of successive life estates in the management or in the property of the endowment.	
The plaintiff had no vested right of suit when the Limitation Act of 1908 was passed.	
If the passing of the Limitation Act of 1908 has cut down and made shorter the period of limitation, the plaintiff should have brought his suit within two years from the date of the passing of the said Act, under section 30.	
Quære; Whether section 6 controls section 30 of the Limitation Act. <i>Monomotho Nath Laha v Annoda Prosad Roy</i>	201
—Limitation Act (IX of 1908), Sec. 19, Sch. I Art. 106—Plaint, amendment of—Acknowledgment of partial liability.	
Where the plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation.	
The suit contemplated by article 106 of the Limitation Act, is to be brought by a plaintiff who has ceased to be a member of the partnership (which is not for a fixed term) by his retirement, and, has consequently become entitled to claim an account and a share of the profits.	
Where there was an unconditional promise to pay whatever might be found due upon accounts taken, down to a certain period, coupled with an express denial of liability to account for the subsequent period, section 19 of the Limitation Act saves that portion only of the claim which is admitted in the letter.	
Per <i>Meekherjee, J</i> : No account can be directed in respect of a partnership business in the absence of one of the partners.	
The Court is very reluctant to deprive a defendant, by amendment of a	

Limitation—(Contd.).

plaint, of a valuable right, which he has already acquired by the operation of the statute of limitation.

An acknowledgment to take a case out of the statute of limitation must be, first, one from which an absolute promise to pay can be inferred, or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed. Consequently the effect of the acknowledgment must depend, in each case, upon the nature of the particular right claimed and the terms of the acknowledgment. *Kallidas Chowdhury v. Srimati Draupadi Sundari Dassee* ...

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—*Limitation Act (IX of 1908), Sec 19, Sch. I, Art. 78—Acknowledgment—Hundi and cheque, payment by—Hundi and cheque dishonoured—Plaint, amendment of—Civil Procedure Code (Act V of 1908) O. 6 R, 17.*

Article 78, schedule I of the Limitation Act has no application to a suit to recover money alleged to be due on accounts taken between the parties, though a payment by the defendant by a cheque and a hundi was dishonoured on presentation. Such payment does not constitute an acknowledgment within the meaning of section 19 of the Limitation Act.

Though under rule 17 of order 6 of the Code of Civil Procedure, very wide powers of amendment are vested in the Court, an application for amendment in the second appellate Court was disallowed on the ground that the plaintiff would start afresh on allegations wholly inconsistent with those made in the original plaint, and to support the new allegations, he would have to bring forward evidence directly contradictory to the evidence already placed by him on the record. *Padma Lochan Patar v. Giris Chandra KIL* ...

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Limitation—*Limitation Act (XV of 1877), Sch. II, Art. 109—Sale under Putni Regulation (VIII of 1819)—Purchaser given possession—Sale set aside—Decree, reversal of.*

A putni was sold in October, 1901, under Putni Regulation for arrears of rent. The defendant purchaser was put into possession. The plaintiff, the owner of the putni, instituted a suit for setting aside the sale on the 17th May, 1902. In that suit they made no claim for mesne-profits which had accrued either before the suit or which accrued during the pendency of the suit. On the 18th August, 1902 the suit was decreed in the first Court, with the result that the sale was set aside. On appeal, the first appellate Court reversed the decree of the first Court on the 13th February, 1903. Then there was an appeal to the High Court and on the 11th of May, 1905, the High Court remanded the case for further consideration and decision, to the first appellate Court. On the 11th September, 1905, the first appellate Court affirmed the decision of the first Court with the result that the sale was set aside. A second appeal to the High Court was dismissed on the 30th May, 1907. The plaintiff then

Limitation—(Contd.).

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instituted the present suit on the 16th September, 1907, for mesne-profits from March 1903 to the date of suit :

Held, that article 109, schedule II of the Limitation Act was applicable and that the plaintiff was entitled to mesne-profits for 3 years from 16th September, 1904 to the 16th September, 1907, the date of the suit :

That the plaintiff was not entitled to deduct from the period of limitation the period from the 13th February, 1903 to 11th September, 1905.

Saraj Ranjan Chaudhuri v. Prem Chand Chaudhuri	257
— Sufficient cause for extension—Application for review ; <i>See</i> Review ...	540
Limitation Act, Secs. 4, 5—<i>Ex parte</i> order admitting appeal out of time—	
Order, if can be set aside at hearing—Question of limitation, when can be finally determined ; <i>See</i> Limitation	253
—, Secs. 6, 30—Permanent lease granted by previous shebait—	
Vested right ; <i>See</i> Limitation	201
—, Sec. 15 sub-sec. (2), if extends the period of limitation mentioned in section 104 H Sub-sec. (2) of Bengal Tenancy Act ; <i>See</i> Limitation	374
—, Sec. 18—Burden of proof—Person committing fraud ; <i>See</i> Execution sale	528
—, Sec. 18—Execution proceedings fraudulently suppressed ; <i>See</i> Execution sale	528
—, Sec. 19—Acknowledgment—Payment by cheque and hundi—Cheque and hundi dishonoured ; <i>See</i> Limitation	392
—, Sec. 19—Acknowledgment, effect of, depends on what ; <i>See</i> Limitation	403
—, Sec. 19—Acknowledgment, nature of ; <i>See</i> Limitation	403
—, Sec. 19—Acknowledgment—Unconditional promise to pay whatever might be found due upon accounts taken down to a certain period ; <i>See</i> Limitation	403
—, Sec. 20—'Interest paid as such' ; <i>See</i> Limitation	141
—, Sec. 28—Simple mortgage—Subsequent adverse possession against mortgagor ; <i>See</i> Adverse possession	212
Limitation Act, Sch. I, Art. 78—Suit to recover money on accounts taken between the parties—Payment by cheque and hundi—Cheque and hundi dishonoured ; <i>See</i> Limitation	392
—, Sch. I, Art. 106, scope of—Partnership, not for a fixed term ; <i>See</i> Limitation	403
—, Sch. I, Art. 134—Shebait, suit by, to recover debutter property— <i>Makarrari</i> and permanent lease granted by previous shebait ; <i>See</i> Limitation	201
—, Sch. I, Art. 134—'Transferred'—Permanent lease granted by previous shebait ; <i>See</i> Limitation	201
—, Sch. I, Art. 181—Execution proceedings fraudulently suppressed—Limitation Act, Sec. 18 ; <i>See</i> Execution sale	528
—(1877) Sch. II, Art. 109—Mesne profits, suit for—Sale under Putni Regulation—Purchaser given possession—Sale, set aside—Decree, reversal—Wrongful possession, if necessary ; <i>See</i> Limitation	257

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Litigant, if can take inconsistent positions in Court ; <i>See</i> suit, forum of ...	96
Local investigation—Appellate Court dissatisfied with Amin's map and report —Error of law, if committed in deciding on other evidence ; <i>See</i> Burden of proof	599
Lunacy Act (IV of 1912), Secs. 3 (Cl 11), 6 ;—Wife's brother, if a relative— Wife's brother, if competent to apply for an inquisition order—Rules under the Act, if applicable to mofussil—Civil Procedure Code (Act V of 1908), applicability of.	
A wife's brother is a "relative" within the meaning of section 63 of the Indian Lunacy Act and is competent to apply for an inquisition order. The rules under the Act framed for the Original Side of the High Court for the Presidency towns cannot be and ought not to be extended to places outside it.	
The provisions of the Civil Procedure Code apply to applications under this Act, <i>Moni Lal Sii v Nepal Chandra Sii</i>	205
Lunacy Act. Sec. 63—Relative—Wife's brother ; <i>See</i> Lunacy Act, secs. 3 (11), 6	205
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—, right of—Endowment for support of family idol ; <i>See</i> Hindu Law—Grant	231
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—, right of—Private charities ; <i>See</i> Hindu Law—Grant	231
Manager of a Court of Wards, if and when can file a suit in anticipation of sanction ; <i>See</i> Suit, maintainability of	125
Minor's share, transfer of, without leave of Court, if void ; <i>See</i> Mortgage decree	110
Misjoinder of parties and causes of action, objection to, determination of ; <i>See</i> Appeal	158
Mitakshara school—Maheswari caste of Bikaner—Widow of separated brother, if can adopt without consent ; <i>See</i> Adoption	517
Mortgage—Mortgagee, purchaser of equity of redemption—Purchase in execu- tion of money decree—Mortgagee, if trustee.	
A mortgagee can purchase an equity of redemption at a sale held in execution of a money decree obtained by a stranger against the mort- gagor. He does not hold the equity of redemption as a trustee for the mortgagor and for his benefit. <i>Bharat Ramanuj Das Mahanta v. Ishan Chandra Halder</i>	431
—Mortgage by ghatwal—Property inalienable but subsequently became alienable.	

A mortgage by a ghatwal of a certain property which was subject to certain restrictions on his right of alienation at the time of execution but which were removed afterwards and before the institution of suit, though it operates as a conveyance, is operative as an executory agreement, which attaches to the property, the moment the restrictions are

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Mortgage—(Contd.).	
removed and in equity transfers the beneficial interest to the mortgagee without any act done by the mortgagor to confirm the mortgage.	
Surendra Nath Dey v Rajendra Chandra Chandra	289
—Mortgage deed—Attestation—Purdanashin Executant—Direct evidence of execution required—Transfer of Property Act (IV of 1882), section 59.	
The requirement as to attestation contained in section 59 of the Transfer of Property Act (IV of 1882), is not complied with unless the attesting witnesses are able to swear both to the act of execution and the identity of the person performing the Act.	
Where, therefore, the only evidence was that the attesting witnesses were on one side of a purdah and the executant of the deed, a <i>purdanashin</i> lady on the other; that her son took the deed behind the <i>purdah</i> , returned with it bearing a signature purporting to be hers, and said it had been signed by his mother, and that the witnesses thereupon attested:	
Held, that the term of the section had not been complied with and that the mortgage was void. <i>Rai Ganga Pershad Singh Bahadur v. Ishri Pershad Singh</i>	548
—Subsequent transfer of mortgaged property—Misrepresentation by some of the mortgagees, effect of—Estoppel—Transfer of Property Act (IV of 1882), Secs. 3, 8, 54, 78, 130—Co-mortgagee's interest, if severable or partible—Mortgage bond, transfer of, if to be made by a registered instrument—Indian Registration Act, 1908, Sec. 17(b)—'Immovable property.'	
Where some of the mortgagees led a subsequent purchaser of a portion of the mortgaged property and a puisne mortgagee of the remainder to believe that the whole property was unencumbered;	
Held, that they were precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against the subsequent transferees, and the effect of the estoppel was to postpone them in respect of their share of the original debt to the puisne mortgagee.	
Held also, it was open to the Court to sever their interests from those of the mortgagees who were under no disability or disqualification, and to make a decree in favor of the latter in proportion to their interest in the debt.	
Per Richardson, J.—A mortgage debt is immovable property both for the purposes of section 54 of the Transfer of Property Act, and for the purposes of section 17(b) of the Indian Registration Act. <i>Sakhluddin Saha v. Sonaulia Sarkar</i>	453
—, how far binding—Mortgage for larger amount than necessity warrants; See Hindu Law—Mortgage	363
—, simple—Adverse possession, subsequent, against mortgagor, if adverse to mortgagee: See Adverse possession	212
—debt, transfer of, how made—Transfer of Property Act, Sec. 130; See Mortgage	453
Mortgage decree—Mortgage executed by widow and next reversioner—Decree against both—Execution, application for, against both—Objection as to	

Mortgage decree—(Contd.)

- Interest after period of grace by widow—Widow, death of, pending execution—Next reversioner, if can raise same objection subsequently—Decree absolute—Further interest.*

A, a Hindu widow in possession of her husband's estate and B, the next reversioner, jointly executed a mortgage bond on which the creditor obtained a decree against both and executed the same against both, claiming interest at the bond rate until actual payment. A alone made an objection as regards interest subsequent to the period of grace but her objection was disallowed. Pending execution A died and B was substituted in her place. B then filed a fresh objection on the ground that the decree-holder was not entitled to interest after the period of grace under the terms of the decree. About the same time he filed an application for the amendment of the decree on the ground that it was not in accordance with the judgment :

Held, that B was entitled to defend his newly acquired title by all means accessible to his new character.

The proper period for allowing further interest after the period of grace, would be when the decree absolute is made. If the decree absolute does not contain any mention of interest it should be considered as disallowed. *Udit Narayan Jha v. Musammat Jasoda Sahun Katar* ...

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Mortgage decree—Transfer of decree to one of the mortgagors—Transfer of minor's share without leave of Court, if void—Assignee of mortgage decree, if can execute—Apportionment.

A transfer of a minor's interest by a certificated guardian without the leave of the District Judge, is voidable at the instance of any other person, that is, in addition to the minor, affected by the transfer.

A judgment-debtor assignee of a mortgage decree can execute it, by putting up the mortgaged property to sale.

A purchase by a mortgagor of the mortgagee's interest does not entitle the other mortgagors to apportionment of their debt. *Jagabandhu Pal Chowdhury v. Haladhar Pal Chowdhury* ...

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Mortgage suit, scope of ; see Adverse possession ...

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Mortgage suit for sale—Decree defective under the Transfer of Property Act, (IV of 1882) S. 88—Sale in execution of such a decree—Confirmation of sale—Mortgagor's right to redeem—Subsequent suit to redeem against the auction-purchaser—Practice—Code of Civil Procedure, (Act XIV of 1882), section 244.

In a mortgage suit for sale of the mortgaged property the decree made did not comply with the provisions of the Transfer of Property Act, section 88, for no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged properties were attached, sold and purchased with the permission of the Court by the mortgagee-decree-holder, and the sale was duly confirmed. The mortgagor subsequently brought the present suit to redeem the mortgage ;

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Mortgage suit for sale—(Contd.).	
<i>Held</i> , that the decree was intended to be made in compliance with the Act, and, whether or not its provisions were complied with, the property and all right, title, and interest of the defendant were in fact sold in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made and that decree was not appealed, and that the mortgagor-plaintiff was barred from a right to redeem.	
<i>Held also</i> , that the question now raised could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court executing the decree, and that the present suit was barred by section 244 of the Code of Civil Procedure, 1882 : <i>C. Ganapattay Mudaliar v. N. Krishnamachariar</i>	367
Mortgage executed by widow and next reversioner—Decree against both—Application for execution against both—Objection as to interest after period of grace by widow—Widow, death of, pending execution—Next reversioner, if can raise same objection subsequently ; See Mortgage decree	576
— of joint property without necessity, if binds mortgagor's order share ; See Hindu Law—Mortgage	363
— of joint property by a manager who is not the father, when justified —Mitakshara School ; See Hindu Law—Mortgage	361
Mortgagee, if can purchase an equity of redemption at a sale held in execution of a money decree obtained by stranger against mortgagor ; See Mortgage	431
—, if trustee—Mortgagee purchasing equity of redemption at a sale held in execution of a money decree obtained by stranger against mortgagor ; See Mortgage	431
Mortgagors, one of the, purchasing mortgagee's interest, rights of ; See Mortgage decree	110
Nazar, payment of—Jotes, non-transferable ; See Occupancy holding ...	587
Negligence, proof of—Considerations where negligence on the part of a person who has to encounter a sudden emergency is in issue ; See Contract Act, Secs. 151, 152	615
Non-occupancy raiyat, ejectment of—Decretal amount, payment of, how to be made—Payment by under-raiyat ; See Bengal Tenancy Act, sec. 66 cl(2)	478
Non-transferable occupancy holding, gift of, if valid ; See Occupancy holding	497
Notice, service of—Carriers Act, Sec. 10—Manner of service, if can be restricted by the contract—Loss of goods—Knowledge of the carrier, if sufficient.	
A condition in a bill of lading requiring the service of notice of claim in respect of the contract at the carrier's office at a particular place, is not inconsistent with the provisions of section 10 of the Carriers Act, and is perfectly legal.	
Notice under section 10 of the Carriers Act must be given, and it is not	

Notice—(Contd.).

enough that the carriers had knowledge <i>aliunde</i> of the loss. The River	
• Steam Navigation Company, Ltd. v. Messrs. Hazarimal Multan Ali ...	294
—under Carriers Act, Sec. 10, if necessary—Knowledge of carriers ;	
See Notice, service of	294
Objection to validity of award at appellate stage, if entertainable ; See Re-	
ference to arbitration	339
—“to validity of award taken by a party who joined in the reference, if	
given effect to ; See Reference to arbitration	339
Occupancy holding—Non-transferable—Custom of transferability subject to	
payment of customary <i>Nazar</i> —Evidence— <i>Nazar</i> , amount of—determined	
by agreement—Transferee of holding, title of, when accrues.	

In order to establish a custom of transferability subject to the payment of a customary *nasar*, the evidence must show that the landlord is bound to recognise the transfer when *nasar* of the amount, or at the rate, determined by custom is tendered to him. There is all the difference between a fixed *nasar*, which the landlord is obliged to accept whether he likes it or not and a *nasar* which is bargained for and paid as the price of a consent which he may give or withhold as he pleases. A practice or course of business in a zemindary office according to which a transferee is recognised provided that the amount of the *nasar* is satisfactory to the landlord is not sufficient.

The payment of *nasar* without more is an indication that the jotes are not transferable without the landlord's consent given on receipt of the *nasar*.

A custom which leaves the amount or rate of *nasar* indefinite, is void for uncertainty. The position is not better than when the *nasar* is determined by agreement.

If there is a customary rate of *nasar* which the landlord is obliged to accept, the transferee of an occupancy holding has no title under the custom until he has paid or tendered *nasar* at that rate : Rani Mina Kumari Sahiba v. Ichamoyee Chowdhurani

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—, non-transferable—Gift, if valid—Gift, when revocable.

The decision of the Full Bench in the case of *Dayamoyi v. Ananda*, is an authority for the proposition that in case of transfer for value, the title passes from the transferor to the transferee, although the validity of the transfer is liable to be questioned by the landlord, who is not a party to the transaction. The principle is also applicable to the case of a transfer by gift.

A gift may be revoked, as a contract may be cancelled, on the ground of fraud, mistake, coercion, undue influence, misrepresentation or like reason. Behari Lal Ghose v. Sindhubala Dasl

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Occupancy holding, transferee of—Title, when accrues—Customary rate of *nasar* ; See Occupancy holding

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—raiyat, if can create permanent heritable under raiyati interest ; See Ejectment

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—right, acquisition of—Bengal Tenancy Act, Secs. 19, 181; <i>See</i> Ghatwali land . . .	556
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—, if can be challenged collaterally; <i>See</i> Receiver . . .	395
—made by District Judge in administrative capacity under section 33 of the Bengal Civil Courts Act; <i>See</i> Revision . . .	472
Ownership—Acts unaccompanied with assertion of adverse right; <i>See Res Judicata</i> . . .	583
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Parties litigant, if can take inconsistent positions in Court, detrimental to their opponents; <i>See</i> Inconsistent positions . . .	535
Partition—Mutt, headship of; <i>See</i> Hindu Law—Grant . . .	231
—, decree for—Preliminary decree set aside on appeal—Final decree passed pending appeal, effect of; <i>See</i> Restitution . . .	451
—, final decree for, pending appeal, effect of—Preliminary decree set aside; <i>See</i> Restitution . . .	451
—, suit for— <i>Plaintiff to prove what—Joint owner and joint possession.</i> In a suit for partition, the plaintiff should establish that he and the defendant are not only joint owners but are also entitled to joint possession, as the object of the suit is to transfer the joint possession into possession in severalty. <i>Durga Charan Acharjee v. Khundkar Enamal Huq</i> . . .	441
—suit, object of; <i>See</i> Partition, suit for . . .	441
Partnership— <i>Right to dissolution, how far affected by terms of partnership contract—Power of Court to decree dissolution—Indian Contract Act, (IV of 1872), Secs. 252, 253, 255—Appellate Court, when should interfere with Court's discretion.</i> A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract. It is not therefore a contravention of section 252 of the Indian Contract Act, for a partner to seek dissolution, or for the Court to decree it, though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. It is to meet the precise predicament that a partnership is not terminable at will, that the Court's power to decree dissolution is conferred in the events enumerated in section 254. It is opposed to sound practice for an appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. <i>Rehmat-un-nissa Begum v. Price</i> . . .	623
—business—Account, if can be ordered— <i>Absence</i> of one of the partners; <i>See</i> Limitation . . .	403

Penal Code (Act XLV of 1860), Sec. 182—Complaint to police—Suspecting a person, if amounts to false information.

Where a complainant in his complaint to the police suspected two persons as being implicated in a theft committed in his house :

Held that, having regard to the fact that there was a theft in his house, the complaint did not amount to giving false information within the meaning of section 182 of the Indian Penal Code, and the proceedings against the complainant under the section ought to be quashed. *Ananga*

Mohan Dutta v. The King-Emperor 230
 ———, Sec. 366—Abduction of married woman ; *See* Abduction ... 436
 ———, Sec. 366—'Marry'—Marriage, illegal and invalid ; *See* Abduction ... 436

Plaint, amendment of—Claim based upon specific Legal relation—Claim on a different legal relation ; *See* Limitation 403

———, amendment of—Court, if can deprive a defendant of a valuable right, acquired by operation of limitation ; *See* Limitation 403

———, amendment of, disallowed ; *See* Limitation 392

———, return of—Decision by Small Causes Court Judge that suit not triable by him—Suit, trial of, on merit ; *See* Suit, trial of 590

Pleader, purchase by, effect of—Continuance of relation of pleader and client—Subject matter of litigation—Adverse interest ; *See* Pleader and client 388

Pleader and client—Pleader, purchase by—judgment-debt, if extinguished.

While the relation of pleader and client continues, the pleader cannot as against his client, acquire absolutely a beneficial interest in or title to the subject matter of the litigation antagonistic to that of his client.

Where a pleader for the judgment-debtor purchased from the decree-holder for Rs. 11,500 a decree for a much larger sum :

Held, that the pleader holds the decree assigned to him in trust for his client, and, if called upon by his client to do so, is bound to assign the decree to him. No Court will decree reconveyance except upon equitable term. The effect of the assignment to the pleader is not forthwith to extinguish the judgment-debt and to release the judgment-debtor from liability. *Nogendrabala Dasi v. Debendra Nath Mahish*... .. 388

Pleader of the judgment-debtor purchasing decree from decree-holder ; *See* Pleader and client 388

Possession, suit for—Defendant in actual possession of law ; *See* Burden of proof 599

Presumption—Bombay Regulation IV of 1827, Sec. 26—Punjab Laws Act, Sec. 5—General or personal law ; *See* Custom 240

———, where applicable—Bengal Tenancy Act, Sec. 5(5) ; *See* Bengal Tenancy Act, Sec. 5 334

Privy Council—Practice—Remand.

Their Lordships refused to take the unusual course of remanding for fresh evidence the appeal which had been argued and which ought *prima facie* to be decided upon the material which were before the Courts below.

Rai Ganga Pershad Singh Bahadur v. Ishri Pershad Singh 548

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Procedure—Civil Court returning a plaint—Small Cause Court of different opinion ; <i>See</i> Suit, forum of	96
Prohibitory injunction embodied in decree, enforcement of ; <i>See</i> Suit, if lies	506
——— injunction embodied in decree, enforcement of—Remedy—Civil Procedure Code, O. 21, R. 31 ; <i>See</i> Suit, if lies...	506
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'Protected Interest'—Ejectment—A person who has already acquired an occupancy right, if loses such right by obtaining a grant of fixed rent ; <i>See</i> Revenue Sale Law, Sec. 37 Proviso	284
——— Settled raiyat holding land in the same village ; <i>See</i> Revenue Sale Law, Sec. 37 Proviso	293
Provincial Small Cause Courts Act, Secs. 5, 16—Transfer or withdrawal of suit—Court vested with Small Cause Court jurisdiction—Special Court constituted under the Provincial Small Cause Courts Act ; <i>See</i> Court of Small Causes	461
———, Sch. II. Arts. 16, 24, construction of ; <i>See</i> Suit, maintainability of	486
———, Sch. II. Art. 31—Suit for recovery of specific sum of money, if suit for accounts ; <i>See</i> Suit, forum of	96
———, Sch. II. Art. 35 (ii)—Suit for compensation for wrongfully cutting a tree grown, and misappropriating crops raised, by the plaintiff on his land ; <i>See</i> Jurisdiction	594
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——— of an entire estate at a revenue sale, what he takes— <i>Mal' lands</i> —Lands situate within the geographical limits of the estate purchased ; <i>See</i> Evidence	133
Putni—Deposit of putni rent by Durputnidar—Possession given to Durputnidar—Putni Regulation (VIII of 1819), Sec. 13—Putni rent, payment of, by Durputnidar—Rent, if can be added to demand.	
Under section 13 of the Putni Regulation, the defaulter can recover his tenure on repayment of the advance made with interest, or on proof that the advance has been realised from the usufruct. But the person making the advance, is not entitled to add to his demand the rent paid to the superior landlord for the years during which he has been in possession : <i>Behari Lal Biswas v. Nasimannassa Bibi</i>	480
Putni Regulation, Sec. 13—Putni rent, payment of, by durputnidar in possession, if can be added to demand ; <i>See</i> Putni	480
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Raiyat holding at a fixed rate of rent, if competent to create a permanent heritable interest in favour of his grantee an under-raiyat ; <i>See</i> Ejectment	579

Rateable distribution—*Civil Procedure Code (Act V of 1908), section 73—*
Decree against same judgment-debtor—Sale by inferior Court.

Where the same property has been attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade, the sale should be held by the Court of superior grade. But where the sale has been held by Munsif, the Subordinate Judge is not to direct the Munsif to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred and the sale proceeds are then rateably distributed in accordance with the provisions of section 73 of the Code of Civil Procedure. *Nilkautha Rai v. Gosto Behary Chatterjee*

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— *Civil Procedure Code (Act V of 1908), Sec. 73—Decrees against estate of deceased testator—Decrees obtained against two out of three executors.*

Two decrees were obtained against the estate of a deceased testator, each obtained against two out of three executors. One of these two executors was common to the two suits. Each decree was *prima facie* capable of execution against the estate :

Held, that the decree-holders were entitled to rateable distribution of the assets under section 73 of the Code of Civil Procedure. *Nilmani Dey v. Hiralal Das*

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Receiver—*Appointment of—Security—Order or decree, propriety of, if can be challenged collaterally—Jurisdiction—Error of Law.*

The propriety of an order or decree made in a cause in which the Court has jurisdiction, cannot be challenged collaterally. This general principle applies to an order for appointment of a receiver by a Court of competent jurisdiction.

Jurisdiction is a power of a Court to hear and determine cases, to adjudicate or exercise any judicial power with reference to them. The Court may commit an error of law, in the exercise of its jurisdiction ; but the fact that such error of law has been committed does not divest the Court of its jurisdiction.

Where the lower Court was directed by the appellate Court to appoint a receiver and take security from him and the former appointed a receiver without taking security :

Held, that the appointment was not without jurisdiction. *Bhalrab Chandra Dutt v. Nandram Agrani*

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Receiver, appointment of, if made with jurisdiction—Appellate Court directing lower Court to appoint receiver and take security—Appointment made without taking security ; *See Receiver*

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—, order for appointment of receiver, if can be challenged collaterally ; *See Receiver*

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Recoupment—*Betterment—Calcutta Improvement Act (V. B. C. 1911), Secs. 41 (a), 42 (a), 78, 81—Full Bench, reference to, validity of—Statute, interpretation of.*

Held by Full Bench (*N. R. Chatterji, J. dissente*) ;

Recoupment—(Contd.).

The Calcutta Improvement Act authorises the Board of Trustee to acquire land compulsorily for purposes of recoupment, that is, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78.

"Affected" in section 42 (a) of the Calcutta Improvement Act, means affected in any way; and the words "by the execution of the scheme" in that section mean "through or owing to the execution of the scheme."

Clause (a) of section 42 should be read with clause (a) of section 41. *Fletcher and Richardson, JJ.* (*N. R. Chatterjea, J.* dissenting.) The rule that the full Bench, if looking into the case as far as is necessary for the purpose it should find that the point does not arise, ought to desist from answering it, is not applicable to regular appeals.

N. R. Chatterjea, J. : It is an error to rely on punctuation in construing Acts of the legislature :

The land 'required for the scheme' in section 41(a) of the Calcutta Improvement Act, means the land which is actually required for what may be called the engineering or construction works.

The word 'affected' in section 42 (a) has no reference to value. It is used in the sense of 'acted upon physically or materially.'

An Act cannot be construed with reference to the provisions of another Act. The question whether the Calcutta Improvement Act gives power to the Board of compulsory acquisition of land for the purposes of recoupment, must be determined with reference to the provisions of that Act.

The Calcutta Municipal Act gives wider powers to the Corporation than those given to the Board by the Calcutta Improvement Act.

Section 81 of the Calcutta Improvement Act comes into operation only when land has been acquired by, or vested in, the Board.

Richardson, J. : 'Land affected' in section 42 (a) of the Calcutta Improvement Act, means land affected for the better. The words 'by the execution of the scheme' which qualify the word 'affected' refer not only to the period of construction but also the period immediately following when the improvement scheme is completed and in operation.

The general rule for the construction of statutes is that the legislature means what it says. The words best declare the intention. But owing perhaps to the imperfection of language as an instrument, or to the fact that language is sometimes mis-used even in legislative enactments, it may not always be easy to say what the meaning is. The language may be doubtful or ambiguous. The Courts may have a choice between different possible constructions, and in such cases there may be subsidiary rules or principles more or less controlling the choice according to the nature of the subject matter, whether the Act is penal or remedial and so forth. Beyond that there is more delicate ground where the strict literal meaning would lead to a result so absurd as to be irrational,

Recoupment—(Contd.).

and it may be found possible to modify the meaning so as to avoid that result.

It is the function of general words to include things not specially named.

• <i>Mani Lal Sing v. Trustees for the Improvement of Calcutta</i> ...	1
Redeem, right to—Mortgage decree defective under section 88 of Transfer of Property Act—Sale in execution of such decree—Confirmation of sale ; See Mortgage suit for sale ...	367
Registration—Lease—Contract for variation of rent payable in respect of lease ; See Admissibility in evidence ...	107
Registration Act, Sec. 17 (b)—‘Immovable property’—Mortgage debt ; See • Mortgage ...	453
—, Sec. 77—Condition precedent—Registration of document ; See Contract of sale ...	538
Regulation VIII of 1819, Sec. 13 ...	480
Remand ; See Privy Council ...	548

—, *Civil Procedure Code (Act V of 1908), O. 41, Rr. 23, 27—Inherent power—Additional evidence.*

The appellate Court has inherent power of remand in cases other than those specified in Order 41, rule 23 of the Code of Civil Procedure, if a remand be necessary for the ends of Justice :

Where the appellate Court remanded to the primary Court for a fresh decision after receiving in evidence the documents tendered by the plaintiffs as also any further evidence which they and the defendants might adduce in support of their respective cases :

Held, that the order was not an order which it was open to the appellate Court to make under order 41 rule 23 of the Code of Civil Procedure ; that the appellate Court should have taken action under order 41, rule 27 ; that in so ordering it did not decide the case on the evidence on the record or deal with it under order 41, rule 27 if additional evidence was necessary. *Bejoy Krishna Mukherjee v. Jibon Krishna Ganguly* ... 596

Rent, assessment of—Chowkidari land transferred to zemindar—Previous settlement with putnidar—Exact mode in which putni rent was originally settled, not known ; See Chowkidari land ... 532

—, *enhancement of—Bengal Tenancy Act (1885), Sec. 52—Burden of proof—“The area for which rent had been previously paid,” meaning of :*

The question in every case coming under section 52 of the Bengal Tenancy Act, the landlord being the claimant, is whether the tenant is in possession of land “in excess of the area for which rent has been previously paid by him.”

The burden of proving an increase in “the area for which rent has been previously paid” is on the landlord. He may generally discharge the burden in two ways ;

Rent—(Contd.).

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(1) By proving that the tenant is in possession of excess land outside the boundaries of the land originally settled with him, for instance land obtained by encroachment or alluvial increment.

(2) By proving that at the original settlement of the land the rent was fixed at a rate per bigha or other unit of measurement or at differential rates according to the quality of the land and so forth, and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable under such agreement.

It is in connection with this second method of proving a right to increase of rent, that questions may arise under clause (2) (a) of section 52 as to the conditions of the tenancy and whether the rent originally fixed was or was not a consolidated rent for the whole area. The rent might be a consolidated rent even if it was calculated at so much per measured or estimated bigha. The question depends on the true intention of the parties to be gathered, in the absence of a written instrument, from all the circumstances. When, however, it is proved that the tenant is holding land outside and beyond the original boundaries, the question as to the rent being a consolidated rent, cannot well arise, except possibly in connection with land gained by alluvion.

The words "the area for which rent has been previously paid" mean the area with reference to which the rent previously paid had been assessed or adjusted. *Dhrupad Chandra Koley v. Hari Nath Sengupta Roy* ...

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—, *suit for—Land Registration Act (VII B.C. of 1876), Secs. 78, 81—Malikana—'Written contract.'*

Where the sum recoverable by the plaintiff was described in a putni lease as 'Malikana' but the lease showed that it was in essence rent and was made expressly recoverable by the summary procedure prescribed in the Putni Regulation :

Held, that section 78 of the Land Registration Act was applicable to a suit for recovery of arrears.

The term 'written contract' mentioned in section 81 of the Land Registration Act, refers to a contract between the person who claims rent as proprietor and the person who is bound to pay rent to him under section 78. Section 81 has no application to a case where the written contract was between the defendant, the person bound to pay rent and the proprietor from whom the plaintiff claims to have derived title as usufructuary mortgagee : *Iswar Chandra Bera v. Kali Charan Santra* ...

—, variation of, contract for, payable in respect of lease—Lease ; See Admissibility in evidence 107

—decree, fraudulent and collusive ; See Burden of proof 137

—payable by putnidar—Resumption of Chowkidari Chakran land—Settlement made by Zemindar with tenant ; See Chowkidari Chakran land ... 494

Rent suit—Co-sharer landlord—Plaint—Bengal Tenancy Act (VIII of 1885),
Sec. 148A—Decree, nature of.

- Co-sharer landlords, who, by arrangement with the tenants, collect their shares separately, and have in previous years brought separate suits for recovery of their dues, are competent to sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co-sharers together, without the consent of the tenants. But if a plaintiff seeks to avail himself of the special provisions of section 148A of the Bengal Tenancy Act, he must in his plaint seek to recover the entire amount due to himself and his co-sharers.
- The nature of a decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plaintiff separately by reason of the fact that he has on previous occasions collected that share of the rent separately from his co-sharers, the decree will be a money decree; if, on the other hand, it is a decree in a suit properly framed under section 148A, the decree will operate as a rent decree, capable of execution under the special procedure prescribed by the Bengal Tenancy Act.

Where the plaintiff throughout the plaint proceeded on the allegation that he had previously collected his share of the rent separately, and, in the first prayer clause, actually sought to recover that share, and in a second alternative clause stated that if it was found that the tenant had not paid the rent due to his co-sharer, he might be granted leave to amend the plaint so as to secure a decree for the entire sum :

Held, that this was not a plaint in a rent suit of the character contemplated by section 148A of the Bengal Tenancy Act. *Rai Balkantha Nath Sen Bahadur v. Ramapati Chatterjee* 101

—Suit by a shebait for his share of rent, if maintainable—Shebait's rights of—Bengal Tenancy Act (VIII of 1885), Sec. 148A.

Where the administration of a trust is vested in several trustees, they all form, as it were, one collective trustee and they must exercise the power of their office in their joint capacity. Their interests and authority being equal and undivided, they cannot act separately but all must join.

The plaintiffs and the *pro forma* defendants were joint shebait of the property dedicated to an idol. The principal defendants were the tenants in occupation of the land. The plaintiffs instituted a suit under section 148A of the Bengal Tenancy Act for recovery of one-fourth share of the rent payable by the tenant defendants on the allegation that they were interested to the extent of one-fourth in the dedicated property while the *pro forma* defendants were interested to the extent of three-fourths :

Held, that the suit was not maintainable, and that, if the *pro forma* defendants declined to join the plaintiffs, the proper course for the latter was to institute a suit for recovery of the entire arrear due : *Narendra Nath Kumar v. Atul Chandra Banerjee* 605

Representative—Mortgagee, purchaser in execution of mortgage decree—
Mortgagor given possession by primary Court—Decree reversed on
appeal; *See* Restitution — — — — — 489

*Res-judicata—Compromise decree—Compromise relating to extraneous matter—
Extraneous matter embodied in decree—Petition containing argument,
not registered, if admissible in evidence—Adverse possession—Waste
land—Tethering and throwing Cow-dung.*

A previous suit between the parties about a piece of land (three cottahs in area) ended in a compromise. The terms of the compromise were set out in a petition which after stating that each party will remain in possession of one half of the three cottahs in dispute in that suit, ran as follows: "Be it noted that the *Brit* lands shall remain in possession of each of the parties in the same way as they stand entered in the survey khatian..... A decree may be passed in this suit in favour of the plaintiff in respect of 1 cottah 10 dhurs of land as per (following) boundaries." The whole of the petition of compromise including the above was recited in the decree and the order was, "It is ordered that the suit be decreed as per terms of the petition of compromise." In a subsequent suit for recovery of possession of waste land which was recorded as plaintiff's *Brit* land in the record of rights:

Held, that the previous suit did not operate as *Res judicata*, even though the argument about the *Brit* lands formed the consideration for the compromise.

Held also, that the agreement recorded in the decree, though not registered was admissible in evidence.

A decree recording an argument as one of the terms of the compromise though not relating to the suit, is a legal record of the agreement between the parties and as such available to the party as evidence.

Acts, such as tethering of cattle and throwing cow-dungs on the land, if unaccompanied with the assertion of any adverse right, would not necessarily denote that a claim of ownership to the land was thereby asserted. *Mababir Misser v. Nanda Klsore Misser* — — — — —

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*Restitution—Preliminary decree for partition, set aside—Final decree, effect of—
Sum levied in execution of final decree.*

When a preliminary decree for partition has been set aside on appeal, no effect remains in the final decree which is passed pending appeal from the preliminary decree. If any sum is levied on the basis of the final decree in execution by A against B, the latter is entitled to restitution of the sum so levied, if his claim is not barred by limitation.

The doctrine of restitution applies, not only where a decree has been set aside directly on review or by way of appeal, but also where a decree ceases to be operative by reason of cancellation of another decree or decree which forms its foundation: *Atu Chandra Sinha v. Kunja Behary Sinha* — — — — —

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Restitution—Purchaser in execution of mortgage decree against plaintiff in a suit for possession, if representative—Possession given by decree—Decree subsequently reversed.

The plaintiffs, who were out of possession at the date of the institution of a suit for possession, obtained a decree in the primary Court. That decree was executed and they were placed in possession. Meanwhile, an appeal preferred by the unsuccessful defendant was decreed by the lower appellate Court and the decree for possession made by the trial Court in favour of the plaintiffs was therefore discharged. The decree of the appellate Court was confirmed by the High Court, and an appeal therefrom under clause 15 of the Letters Patent proved infructuous. In the interval, the present petitioner, had purchased the disputed property in execution of a mortgage decree obtained against the plaintiffs and was placed in actual possession of the purchased property by the Court. On reversal of the decree of the trial Court, the opposite party applied to be restored to possession by way of restitution :

Held, that for the purpose of transference of possession from the plaintiffs to the petitioner, the latter was a representative of the plaintiffs and the doctrine of restitution was applicable. *Sheodarsanlal Bajpai v. Joges Chandra Roy*

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—, doctrine of, applicability of, to inoperative decree ; *See* Restitution

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Revenue Sale—Bengal Land Revenue Sales Act (XI of 1859), Secs. 31 and 53—Encumbrances—Sale proceeds—Purchase by the proprietor—Sale brought about by dishonest motives of the proprietor—Code of Civil Procedure (Act V of 1908), Secs. 107 and 151, order 41, rule 33—Power of the Court of appeal—Estoppel—Fraudulent behaviour, effect of.

The Bengal Land Revenue Sales Act, section 31 provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court, but the section nowhere transfers the charge from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section, and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in the hands of the Collector.

Where the property is bought by the recorded proprietor and the estate is acquired, under section 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale has merely provided money for payment of the Government claims, and the encumbrances are left entirely unaffected and could only be enforced against the property, and the rights to the sale proceeds of the recorded proprietor, who has purchased the property, are those under section 31,

Revenue sale—(Contd.).

notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest.

In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the *benamidar* of the purchaser at the sale, and consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The Court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the Court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale proceeds :

Held, that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts that showed all the circumstances relating to the sale, the Court had abundant power under sections 107 and 151, and Order 4, rule 33, of the Code of Civil Procedure, to vary, as it did, the decree in the prior mortgagee's suit ; *Held, also*, that the fact that the puisne mortgagee did not attack the sale in the prior mortgagee's suit, did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suits, and obtaining consequential relief.

A man is not to be punished for fraudulent behaviour by making him suffer other penalties than those which are the direct consequence of his fraud. *Tarini Charan Sarkar v. Bishun Chand* ... 303

— *Chowkidari Chakran land, if passes—Chakran land treated as separate—Original estate sold for arrears of revenue.*

Chowkidari chakran lands form part of the original estate, and, when they are resumed and transferred to the Zemindar, the latter does not acquire thereby a new estate :

Where the Collector treated the enfranchised chowkidari chakran lands as constituting by themselves a separate estate subject to the payment of a separate assessment made under the Village Chowkidari Act, and the original estate as created at the time of the Permanent Settlement was treated as a separate estate and was exposed for sale for recovery of arrears due therefrom, the sale being not for the recovery of the amalgamated revenue :

Held, that the purchaser at the revenue sale did not acquire title to the Chowkidari chakran land. *Brojendra Lal Das v. Deb Narain Tewari* ... 491

Revenue Sale Law (Act XI of 1859), Sec. 37, *Proviso*—'Protected interest'—*Occupancy raiyat obtaining grant of fixed rent—Occupancy raiyat at fixed rent under old law.*

Revenue Sale Law—(Contd.).

A person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right; such a person is protected from ejectment, under section 37 of the Revenue Sale Law.

A raiyat who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy raiyat although his rent has been fixed in perpetuity by reason of which he becomes a raiyat holding at fixed rates according to the classification of raiyats in the Bengal Tenancy Act. *Lakhi Charan Saha v. Hamid Ali* ... 284

— (Act XI of 1857), Sec. 37, Proviso—'Protected interest'—*Settled raiyat holding land in the same village.*

A settled raiyat holding land which was sold for arrears of revenue, in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent, has a protected interest within the meaning of the proviso to section 37 of the Revenue Sale Law. *Lakhi Charan Saha v. Mokar Ali* ... 293

Reversioner—Hindu Law—Nature of a reversioner's right—A guardian cannot deal with his ward's reversionary right.

A Hindu reversioner has no right or interest *in presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. *Amrit Narayan Singh v. Gaya Singh* ... 296

—, next, if can enter caveat and contest suit—Immediate reversioner not contesting; *See* Caveat ... 320

—, next, suit for declaration by—Alienation by Hindu widow—Declaration involving a finding that the claimant is the next reversionary heir—Specific Relief Act, Sec. 42 III (e); *See* Declaratory decree ... 186

Reversioner's right, nature of; *See* Reversioner ... 296

Review—Appeal heard by a Division Bench of the High Court—Jurisdiction of a single Judge to amend the judgment and decree—Review granted on a particular point, if re-opens the whole case—Qualified order, if can be passed on review—Rehearing of the case, if necessary—Civil Procedure Code (Act V of 1908), order XLVII.

As appeal was heard by division Bench of the High Court. One of the Judges constituting the Bench having subsequently ceased to be a member of the Court, an application for a review of the judgment was presented to the other Judge, who issued a Rule, and not only made the Rule absolute with the consequence that the judgment and decree stood amended in the manner stated in the order for issue of the Rule, but also proceeded to act under rule 8 of order XLVII of the Code of Civil Procedure, with the result that the order made on the rehearing of the

Review—(Contd.).

case was identical with the order whereby the Rule was made absolute. An appeal was then preferred against the judgment of the single Judge under section 15 of the Letters Patent, and the appellate Court holding that the single Judge had no jurisdiction to rehear the case under rule 8 of order XLVII of the Code, allowed the appeal, and directed that the appeal should be reheard. The appeal having then come on for hearing before another Division Bench of the Court, the Bench came to the conclusion that the appeal was not to be re-heard in its entirety, but the ground in support of the application for review of the previous judgment was the only ground open for consideration by them, and the Bench passed a decree identical with that passed by the Judge who heard the application for review of the previous judgment. Upon an application for review of the judgment passed by the Division Court having been presented on the ground that the whole appeal should have been re-heard:

Held, that there was an end of the matter as soon as the Rule issued by the Judge who heard the application for review of the first judgment was made absolute, by reason of which the judgment and the decree would as a matter of course be amended in the way he intended them to be amended, and in the way he intended them to be drawn up, and from that moment every other proceeding was superfluous :

Held, also, the judgment under review having been passed in an appeal concluded by a final decree it was not necessary to set it aside inasmuch as it only affirmed the final decree passed in the case.

Per Mookerjee, J.—A review may be granted either as to the entirety of the order assailed or as to portion only thereof.

Rule 8 of order XLVII of the Code of Civil Procedure clearly leaves it optional with the Court to determine whether when a review is granted, the case should be re-opened in part or in its entirety. *Gour Sundar Bhowmik v. Rakhal Raj Bhowmik* 326

—‘*Strict proof*’—*Civil Procedure Code (Act V. of 1908), O. 47, R. 4, Proviso d. (b)*—*Limitation—Sufficient Cause for extension.*

‘*Strict proof*’ in clause (b) of the proviso to rule 4, order 47 of the Code of Civil Procedure, means proof according to the formalities of law, and does not refer to sufficiency of proof in securing a particular conviction ;

A judgment was pronounced on the 23rd May, 1913 but the decree was not signed till the 30th May, 1913. An application for review on the ground of discovery of new evidence was made on the 18th December, 1913. The new evidence was not available to the petitioner for review till the 9th December, 1913 :

Held, that there was sufficient cause for not making the application for review before the expiry of the period of limitation prescribed therefor. *Chandra Kanta Bhattacharjee v. Lakhan Chandra Chakrabarti* 540

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Review, qualified order, if can be passed on ; See Review	326
— granted on a particular point, if re-opens the whole case ; See Review	326
Revision— <i>Civil Procedure Code (Act V of 1908), Sec. 115 (c)</i> — <i>Charter Act, Cl (15)</i> — <i>Mistake of fact—Wrong decision based thereon—'Superintendence'—Appeal, if lies.</i>	

The respondent's landlord obtained a decree for rent against them, and in execution of that decree he caused respondents' share in a putni taluk to be put up for sale. The share was two-thirds of the taluk. In the sale the share was bought by the owner of the remaining one-third share.

- Subsequently the respondents applied to have the sale set aside, and this application was granted by the Munsif. On appeal to the District Judge by the auction-purchaser, the order setting aside the sale was reversed and the sale was confirmed. The learned District Judge in appeal stated that the property sold was one-third share and he also considered the purchaser to be a "new comer." Thereupon the judgment-debtor preferred a motion in the High Court : a Rule was issued, and in due course the Rule came on for hearing before a Division Bench. The senior Judge held that the case was one in which it was right to interfere and directed, that the appeal should be heard again by the District Judge. The other Judge however was of opinion that the circumstances were not such as to bring the case within the scope of section 115 of the Code of Civil Procedure. The auction-purchaser then lodged an appeal against the order of the senior Judge :

Held, that an appeal lay under clause 15 of the Letters Patent against the order of the senior Judge, as his judgment was one which deprived the auction-purchaser of the benefit of the District Judge's judgment, which confirmed the sale and consequently it was a judgment which materially affected the merits of the question between the parties.

Held also (Teunon J. contra). A mistake of fact and a wrong decision based on it, did not constitute illegality or irregularity within the meaning of cl. (c) of section 115 of the Code of Civil Procedure. The High Court could not interfere with the decision of the learned District Judge neither under cl. (c) of section 115 of the Code of Civil Procedure, nor under clause 15 of the Charter Act.

That the High Court could not interfere under section 115 of the Code of Civil Procedure as the judgment-debtor had his remedy in review of judgment.

Held further (Teunon, J. expressing no opinion). The word 'superintendence in clause 15 of the Charter Act should be construed very narrowly.

Kumer Chandra Kishore Roy Chowdhury v. Basarat Ali Chowdhury , ...

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— *Civil Procedure Code (Act V of 1908), Sec. 115*—*Error of law.*

High Court refused to interfere under section 115 of the Code of Civil Procedure although it was of opinion that the lower Court's decision was

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erroneous in law. *The River Steam Navigation Company, Ltd. v. Messrs Hazarimall Multan Ali*

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—*Criminal Procedure Code (Act V of 1898), Sec. 145, proceedings under—Magistrate's refusal to look into documentary evidence—Title, evidence of—Possession of a part of the disputed property, if evidence of possession of the whole—Conclusion, not supported by evidence—Irregularity—High Court, interference by—Government of India Act, 1915, Sec. 107.*

Per Chitty and Richardson, JJ. (Tennon J. Contra)—The refusal of a Magistrate to accept or look at any documentary evidence and evidence of title, in a proceeding under section 145 of the Code of Criminal Procedure, is not a material irregularity justifying the interference of the High Court in the exercise of its power of superintendence under section 107 of the Government of India Act.

The question how far possession of a part of a coal mine is evidence of possession of the whole is primarily a question of fact.

High Court cannot interfere with an order passed under section 145 of the Criminal Procedure Code on the ground of an error committed by the magistrate as to the conclusion drawn from the evidence on the record as it cannot be put higher than an error of law, and cannot be described as an irregularity, and does not go to the jurisdiction. *Shelkh Sajudd Mandal v. F. L. Cork*

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—*Order of acquittal—Conviction by first Court—Appellate Court, reversal by—No discussing of evidence—Civil nature.*

Where the trial Court has tried out a case on the merits and come to a conclusion that the accused was guilty of criminal trespass, it is not competent for a Court of appeal without going into the case or discussing the evidence or coming to any conclusion thereon, to acquit the accused on the ground that the matter is of a civil nature. *Haral Chandra Nana v. Osman Ali*

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—*Order made by District Judge in administrative capacity—Bengal Civil Courts Act (XII of 1887), Sec. 33—Government of India Act, 1915, Sec. 107.*

The High Court cannot, under section 107 of the Government of India Act, 1915, set aside an order made by a District Judge under section 33 of the Bengal Civil Courts Act.

An order made by a District Judge under section 33 of the Bengal Civil Courts Act, in his administrative capacity is not clothed with a judicial character, merely because it is based on evidence taken by him. In re *Atul Chandra Gupta*

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Right to redeem—Mortgage decree defective under section 88 of Transfer of Property Act—Sale in execution of such decree—Confirmation of sale; See Mortgage suit for sale

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Rules under Lunacy Act framed for the Original Side of the High Court for the Presidency towns, if applicable to Mofussil; See Lunacy Act, Secs. 3(11), 63

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Sale by inferior Court—Property attached in execution of two decrees—Decrees passed by Courts of superior and inferior grades—Court of superior grade, what procedure is to follow ; <i>See</i> Rateable distribution	145
Sanction to prosecute,— <i>Criminal Procedure Code 1898, Secs. 195 cls. (6), (7)—Bengal Tenancy Act (VIII of 1885), Sec. 69, appraisement proceedings under—Collector's Court, if subordinate to the Court of the District Judge for the purpose of section 195.</i>	
Proceedings under sections 69 and 70 of the Bengal Tenancy Act are clearly of a civil nature ; and any sanction to prosecute given or refused in such proceedings by the Collector may be revoked or granted by the District Judge, as the Collector's Court must be regarded in such cases as subordinate to the principal Court of original civil jurisdiction, that is, to the Court of the District Judge, for the purposes of section 195 of the Criminal Procedure Code. <i>Chandl Charan Giri v. Gadadhar Pradhan</i>	316
Self-acquired property—Gains obtained from science or learning—Mitakshara ; Hindu Law—Joint family	345
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Second Appeal— <i>Decision on surmises and conjectures.</i>	
It is open in second appeal to attack a decision based not on evidence but on surmises and conjectures. <i>Dhrupad Chandra Koley v. Hari Nath Singha Roy</i>	563
Security for good behaviour— <i>Criminal Procedure Code (Act V of 1898), Secs. 109 Cls. (a) and (b), 118.</i>	
The petitioner, who was by profession a kabiraj and a dealer in cocoons was found at about midnight in a lane in town in association with two others who had in their possession house-breaking implements. On being discovered he fled and when arrested he remained silent. The explanation subsequently offered to the Magistrate of his presence at the time and place in question was found to be false :	
<i>Held</i> , that the facts did not bring the petitioner within the provisions either of clause (a) or (b) of section 109 of the Code of Criminal Procedure.	
<i>Per Shamsul Huda, J.</i> : Clause (a) of section 109 of the Code of Criminal Procedure refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. It does not apply to the case of a person brought under arrest. <i>Rashu Kabiraj v. King-Emperor</i>	382
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Specific performance—*Contract by head of joint family—Head of the family not competent to bind others' shares—Decree, nature of.*

In the absence of misrepresentation or misconduct, the general rule is that where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share. The case will be different if nothing more than partial performance is possible by reason only of the default of the defendant, because no man ought to be allowed to take advantage of his own wrong :

Defendant No. 1 professed to enter into a contract on his own behalf as also on behalf of the other defendants. They were members of a joint family of which the first defendant was the head. The plaintiffs accepted the contract on the faith of the assurance that the first defendant was competent to bind the property held by himself and his co-sharers. The first defendant, it turned out, was not in a position to bind his co-sharers, but his own share was large enough for the purposes of completion of the contract made by him with the plaintiffs :

Held, that the defendant No. 1 could not escape from his obligation merely because he acted in excess of his authority and was not in a position to bind his co-sharers ; and that the decree for specific performance in respect of his share of property should be made : *Shama Charan Kotal v. Kumed Dasl* 611

—, suit for—Suit, nature of—Conveyance ; *See* Contract of sale 538

Specific Relief Act, Sec. 42 Ill. (c)—Alienation by Hindu widow—Suit for declaration by next reversioner—Declaration involving a finding that the claimant is the next reversionary heir ; *See* Declaratory decree ... 186

—, Secs. 42, 43—Declaration that marriage invalid—Suit by Mahomedan mother and certificated guardian ; *See* Declaratory suit ... 603

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Stamp Act, Sec. 33—Impounding of document—Document, not basis of suit—Document produced with another document, basis of suit ; *See* Document ... 525

Statement of accused person—Single statement containing more information than what is contemplated in Sec. 24, Evidence Act—Statement, how far admissible—Evidence Act, Sec. 27 ; *See* Evidence, admissibility of ... 148

Statements by accused, additional incriminating, during verification, if admissible in evidence ; *See* Evidence, admissibility of ... 148

Statutes, construction of—General rule ; *See* Recoupment ... 1

Substitution—Plaintiff, death of—Suit for recovery of money ; *See* Succession Certificate Act, Sec. 4 Sub-sec. (1) (a) 400

Succession Certificate Act (VII of 1889), Sec. 4, Sub-sec. (1) (a)—Plaintiff, death of—Substitution—Suit for recovery of money.

Section 4, sub-section 1, clause (a) of the Succession Certificate Act applies to the case of a person who has been substituted as plaintiff for one who has died pending a suit for recovery of money due on a bond. No decree can be passed in favour of the substituted plaintiff without the production of a succession certificate : *Nepusi Bawa v. Nasiruddin* ... 400

Suit, forum of—Suit for recovery of specific sum of money—Suit for accounts—Provincial Small Cause Courts Act (IX of 1887), Sch. II. Art. 31—Litigant, if can take inconsistent positions in Court—Civil Procedure Code (Act V of 1908), O. 46, Rr. 6, 7.

A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. There cannot, in essence, be a suit for accounts by the plaintiff against the defendant unless the defendant is under a liability to render accounts to the plaintiff.

The plaintiff asserted that he was entitled to get Rs. 418 for salary, Rs. 367 as money borrowed for the benefit of the defendant and Rs. 76 as house rent that is, Rs. 861 in the aggregate. He then allowed credit for Rs. 425 and claimed to recover Rs. 466. The plaint added that if the correctness of the amount was questioned, the amount due might be determined on examination of the accounts :

Held, that the suit was not a suit for accounts under Art. 31, Sch. II of the Provincial Small Cause Courts Act and was cognizable by a Court of Small Causes.

A plaint was returned to the Court of Small Causes on the objection of the defendant :

Held, that no objection to the jurisdiction of the Small Causes Court to hear the suit could be taken by the defendant, as no litigant could be allowed to take up inconsistent positions in Court.

Where a civil Court returned the plaint on the ground that the suit was triable by a Court of Small Causes and if the Judge of the Small Causes Court was of a different opinion, he might reasonably have entertained a doubt as to the *forum* where the suit should be instituted and thus refer the matter to the High Court for decision. On the other hand, if he (the Small Cause Court Judge) was so confident of the correctness of his view as to entertain no doubt whatever in the matter within the meaning of rule 6 (1) of order 46 of the Code of Civil Procedure, he might, at any rate, send the record to the District Judge with a request that action might be taken by him under rule 7. *Kabotranath Banerjee v. Kallidasi Dasi* 96

—, nature of—Suit for specific performance—Conveyance ; *See* Contract of sale 538

—, hearing of—Civil Procedure Code (Act V of 1908), Order XIII, Rr. 1, 2, Order XVII, R. 1—Evidence, production of—Delay, if reasonable—Discretion—Appellate Court, interference by.

Order XVIII, rule 1 of the Code of Civil Procedure which gives the Court power to adjourn the hearing of a suit draws a distinction between the hearing of the suit and the hearing of evidence.

Held, therefore, that the trial Court had, under order XVII, rule 2 of the Code, a discretion to refuse to accept the documentary evidence on which the plaintiffs intended to rely, and which were not produced before the

	PAGE.
Suit—(Contd.).	
date fixed for the hearing of the suit, on which date the parties had been directed to produce their documentary evidence, though the hearing resulted only in an adjournment.	
<i>Held</i> also, that that the appellate Court ought not to interfere with the discretion exercised by the trial Court on the question whether the delay in producing the documentary evidence was or was not unreasonable, unless it is satisfied that the trial Court exercised the discretion improperly or capriciously. <i>Blawanath Sinha v. Kallcharan Sinha</i>	119
—, <i>if lies</i> —Civil Procedure Code (Act V. of 1908) Sec. 47—'Party'—'Representative.'	
If the property claimed by A in his personal capacity was sold, in execution of a decree passed in a suit in which he was sued in a representative character, as the property of B, it was open to A to apply under section 47 of the Code of Civil Procedure to have the sale set aside. A separate suit was not maintainable. <i>Khiltish Chandra Banerjee v. Thakomani Debi</i>	572
—, <i>if lies</i> —Prohibitory injunction, decree for—Mode of enforcing the decree—Separate suit, <i>if lies</i> —Civil Procedure Code (Act V of 1908) O. XXI. r. 35 Cls. (1) and (5)—"Act required to be done," meaning of.	
A suit is not maintainable for enforcement of a prohibitory injunction embodied in a decree, but the remedy lies by way of execution under order XXI, rule 32 of the Code of Civil Procedure.	
<i>Per Richardson, J.</i> —Order XXI, rule 32 cl. (5) of the Code applies both to mandatory as well as to prohibitory injunctions.	
The expression "the act required to be done" means what has to be done to enforce the injunction. <i>Sachi Prasad Mukerjee v. Amar Nath Rai Choudhury</i>	506
—, <i>if lies</i> —Suit for recovery of arrears of rent—Rent, apportionment of—Joint landlords and tenants—Rights and obligations—Bengal Tenancy Act (VIII of 1885), Sec. 61.	
The plaintiff and the fourth defendant were, at the date of the institution of a suit for apportionment of rent and for recovery of arrears at the rate settled by the decree, joint landlords of the tenants defendants. It was not possible for the tenants to obtain joint receipts of the co-sharers for payment of rent. The tenants, consequently, made deposits in Court under section 61 of the Bengal Tenancy Act :	
<i>Held</i> , that the plaintiff could not, as a matter of right, claim from the tenants, what he estimated to be his proportionate share of the rent, before the rent was actually apportioned by the decree made in the suit : That the deposit of rent by the tenants under section 61 of the Bengal Tenancy Act, was a valid one. <i>Satyesh Chandra Sarkar v. Haji Jilkar Rahman</i>	438
—, institution of, in wrong Court—Court, if can try the suit on merits, instead of returning the plaint ; <i>See</i> Suit, trial of	590

Suit, *maintainability of*—*Consideration, refund of*—*Void agreement*—*Agreement opposed to public policy*—*Agreement to serve payment of the principal sum*—*Bond, if enforceable.*

A suit is maintainable for the recovery of the sum actually paid pursuant to an agreement which was opposed to public policy.

- *Quere* : whether an agreement by which the defendants, in consideration of a sum advanced by the plaintiff, agreed that one of them should always work for the plaintiff till the payment of the principal sum, and interest on that sum was not to be paid in cash but was to be liquidated by the services of one or other of them, whom the plaintiff undertook to feed but not to clothe, was a slavery bond and not enforceable as being opposed to public policy. *Anandiram Mandal v. Goza Kachori ...*

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—, *maintainability of*—*Manager of Court of Wards*—*Power to institute suit without Court's sanction*—*Suit, if can proceed without Court's order*—*Court of Wards Act (IX B. C. of 1872), Sec. 55.*

The law gives the manager of a Court of Wards, power to file a suit in anticipation of the sanction when the suit would otherwise be barred by limitation. Such a course should be adopted where there is very little time left to get the authority of the Court of Wards.

Though a plaint may be filed in order to prevent a suit from being barred by limitation, the suit shall not be proceeded with except under the order of the Court. If a suit be proceeded with without such order, all proceedings taken subsequently to the filing of the plaint, being without jurisdiction, should be set aside.

In the circumstances of the case, the land being chur land, the manager of the Court of Wards was held justified in instituting the suit without the authority of the Court of Wards, although there was some time between the date of the institution of the suit and the date on which the limitation would expire from the time when the cause of action arose. *Digendra Chandra Sen v. Nritya Gopal Blawas ...*

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—, *maintainability of*—*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 15, 24*—*Suit to enforce an award.*

A suit to enforce an award being in essence a suit for specific performance of a contract, is not cognizable in a Court of Small Causes :

Articles 15 and 24, second schedule of the Provincial Small Cause Courts Act, are to be read together. *Kunj Behari Burdhan v. Gosto Behari Burdhan ...*

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—, *maintainability of*—*Tenant, status of*—*Settlement officer*—*Settlement of rents*—*Bengal Tenancy Act (VIII of 1885), Secs. 105 A, 109*

A Settlement Officer, when hearing an application for settlement of rent, has jurisdiction to enquire as to whether a tenant belongs to the class to which he was shown in the record-of-rights. It is not competent to a civil Court under section 109 of the Bengal Tenancy Act to enquire into the status of a tenant, which was the subject of enquiry before a Settlement Officer. *Bepin Krishna Kumar v. Hari Das Ghose ...*

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—, *trial of*—*ex parte decree, setting aside of, by another decree.*

Sult—(Contd.).

When a consent decree was set aside, the result was to relegate the parties to the position they previously occupied, with the result that the suit which had terminated in the consent decree had to be retried when the consent decree was vacated :

Where a suit was terminated by an *ex parte* decree, which was set aside by a Court of competent jurisdiction :

Held, that the *ex parte* decree whereby the suit was terminated, stood cancelled and the suit remained on the file of the Court as an undisposed of suit and that the Court should proceed with trial of the suit. *Dharanidhar Aditya v. Hemanga Chandra Jana* ... 592

—, trial of—Suit, institution of, in wrong court—Court, duty of—Court, if can try the suit on merits, instead of returning the plaint—Civil Procedure Code (Act V of 1908), O. 7, R. 10—Applicability to Provincial Small Cause Court.

A Small Cause Court Judge is bound to return a plaint for presentation to the Court in which the suit should have been instituted. After deciding that the suit is not triable by him, he should not proceed to try the case on the merits :

Order 7, rule 10 of the Code of Civil Procedure applies to Provincial Small Cause Courts. <i>Pade Mahomed v. Chettra Nath Chowdhury</i> ...	590
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Per Mookerjee J : The fact that the rent is reserved at so much a year, does not conclusively show that the tenancy is from year to year :

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ERRATA.

Page 48 Margin—For "N. R. Chatterjea, J." read "Teunon, J."
Page 583 lines 7 and 23—For "argument" read "agreement."

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{ NO. 1.

ALIEN ENEMY IN ANCIENT AND MODERN LAW.

"A war", says Grotius, "declared against him, who has the supreme authority in a population is considered to be declared against all his subjects and those who may join them as allies"(1).

These words sum up the theory, which not only in the ancient, but also in the medieval world, determined the mutual relations of the subjects of belligerent states.

The theory was based upon the identity of the rulers and the ruled, the prince and the subjects. The existence of war not only brought belligerent sovereigns in hostile relations with each other, but all the subjects of a belligerent state wherever they might be, were *ipso facto* clothed with an enemy character which entitled them, nay made it their duty to inflict as much injury and devastation as possible upon their belligerent neighbours. Thus whatever might be the position of a foreigner in ancient Greece, or Rome,—whether he was shut out for all civic purposes as in the exclusive Dorian States, or treated as a citizen by Liberal Attica—and whether or not, the growth of *Jus gentium*, and the subsequent policy of the Imperial Rulers of Rome, engulfed the Perigrins all in a world-wide stream of Roman Citizenship—the fact remains, that the ancient societies did not recognise that any right could subsist, between the individual subjects of two states at war with each other.

Hence, the word "alien enemy," as used by ancient writers, signified, a natural born subject of the state, with which his own country was at war, and in this sense it was defined in *Calvin's case* (2) as "one who is born out of legiance." Birth was regarded as the sole determining factor of a man's nationality, the only criterion of ascertaining his character at the time of war; the enemy taint fell

(1) Grotius. III. 3, 9.

(2) (1608) 7 Co. Rep. 1.

not only upon those, who actually resided in the enemy territories, but it fell upon those also, who being born, in the enemy country, resided or were domiciled elsewhere.

These ideas however have been gradually changed. Grotius himself, though he admitted the ferocious nature of war in the abstract, strove to mitigate its harshness, in accordance with the behests of divine will.

Bynkershoek, at the beginning of the 18th century maintained, that there might be a state of war and state of peace existing simultaneously, and notwithstanding the existence of belligerent relations commerce might be permitted to some extent.

Vattel writing after him in 1758, emphasised the distinction between individuals and states, and asserted that injuries could be inflicted upon enemies only under orders, or commissions of the state.

After that *Rousseau* (1) in his fine imaginative strain, promulgated the celebrated doctrine in his *Contract Social* that "war is not a relation of man to man" but of state to state, in which individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers, not as members of the country, but as its defenders. In fact a state could only have other states for enemies, since no true relationship can be established between things of different types."

This proposition indeed has not been literally accepted anywhere in this world, but it cannot be denied, that the influence it has exerted upon all departments of the law of war is immense.

The old order of ideas has been crushed out, and a newer and a more wholesome set has taken its place. Changes in theory have brought about changes in the practice.

Birth has ceased to be the sole test of determining enemy character, and the doctrine of absolute allegiance, which irrevocally bound a subject to his sovereign, has been abrogated in almost all the civilised systems.

A person *sui juris* is now perfectly competent to choose for him a new nationality, by being adopted or naturalised in another country, and the municipal laws of various countries (of which the English Naturalisation Act of 1870 is a specimen) prescribe the method by which this naturalisation can be effected. Nay modern law has gone even further than this, it is not only by naturalisation in a friendly country, that the enemy taint can be washed off; according to the prevailing practice, even without naturalisation, a domiciled resident of a country can have his character determined by the place of residence.

(1) *Contract Social* liv, 1, chap. iv.

- "Under the system of public law" Says Twiss (1) "Domicile has become the criterion of national character for purposes of war, and accordingly, all natural-born subjects of a belligerent power, who may have abandoned their native country, and have acquired a domicile in a neutral country, before hostilities have commenced, will have effectually clothed themselves, with the character of neutral subjects; precisely, as every natural-born subject of neutral power, will have clothed himself with the character of an enemy subject, by long continued residence, coupled with the intention of remaining in the enemy territory."

We may add, that for the purpose of contractual relations, and for prohibition of intercourse with enemies, the question is not one of civil domicile but of what is known as Commercial Domicile.

"The national character of a merchant" says Halleck "is determined by his commercial domicile, and not by the country to which his allegiance is due either by his birth, or by subsequent naturalisation. He is regarded as a political member of the nation, into which by his residence and business, he is incorporated, and as a subject of the Government which protects him in his pursuits, and to the support of which he contributes by his property and industry (2)."

The remarks apply to non-merchants as well, but whether merchants or non-merchants, it is clear, that the real or civil domicile, which governs the civil rights, has very little to do in determining his enemy character, at the time of war. The criterion is the so-called *Commercial Domicile*, which as Dicey defines in his *Conflict of Laws* "is such a residence in a country for the purpose of trading there, as makes a person's trade or business, contribute to or form part of the resources of such country, and renders it therefore reasonable, that his hostile, friendly or neutral character should be determined by reference to the character of that country" (3).

Such domicile is called the "Commercial Domicile—and is the place or country where he carries on business."

It differs on many important points, from the ordinary or civil domicile, which attaches to every man at his birth, or is acquired by voluntary residence in another country with the intention of residing there for an indefinite period of time.

In a civil domicile "residence" is *prima facie* evidence, but it is more than *prima facie* evidence in a Commercial Domicile, where even the intention to reside for an indefinite period of time need not

Difference between civil and commercial domicile.

(1) Twiss "The Law of Nations II, p. 299.

(2) Halleck's International Law, Vol. I, p. 444.

(3) Dicey's Conflict of Laws p. 740-45.

be present. In order to constitute a commercial domicile it is enough that the man intends to carry on business or trade for the present; time is here the grand ingredient, and lastly commercial domicile may be established even without any residence. If a person carries on business in the enemy's country in time of war, or continues that connection during that war, the fact that he resides in a neutral territory is no protection.

"There is a traffic," said Lord Stowell in the *Vigilantia* (1) "which stamps a national character on the individual, independent of that character, which mere personal residence may give him." "A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be considered as a subject of both, with regard to transactions, originating, respectively in those countries, that he had no fixed counting house in the enemy's country, will not be decisive."

Thus according to the law, as it stands, the Germans, who would reside, or carry on trade in England during the present war, would not be regarded as enemy.

Whether they will be entitled to all the rights of a citizen, and will have *locus standi* in a Court of justice, is a question which it is difficult to answer. There is very little direct authority on the point except certain observations of their Lordships in *Janson v. Driefontein & Co.* (2).

In the opinion of Sir Leslie Scott, a mere temporary residence, apart from commercial domicile, is not sufficient to give an enemy a non-hostile character. "The Germans, who comply with the 'alien restriction order,' may remain on sufferance during the present war, in England, but we do not think that the order is enabling in its character, or is intended to confer privileges such as were used to be conferred by a license to trade." In the first proclamation issued by the Government during the present war, we see that the term "Enemies" is used with reference to all "Persons," resident, carrying on business, or being in the German empire; and all persons resident, carrying on business or being in our dominions are excluded from the category of enemies.

This proclamation was revoked by proclamation No. 2, and although in the latter the wording is altered, yet the matter practically remains the same.

The question, then arises, as to whether the effect of proclamation is to invest all enemies who are temporarily in the British Isles,

(1) (1798) 1 Ct. Rob 615.

(2) (1902) A. C. 505.

with a temporary cloak of British nationality? Notwithstanding, the countenance which this doctrine receives from "the line of war argument of Pitt Cobbet (See Pitt Cobbet's Notes on *Kershaw v. Kelsey* in his cases Vol. II), the common law, says Mr. Scott is clear, that mere residence in the country, will not cause an enemy to cease to be an enemy, and if the Government intended to give that immunity, the proclamation would have given it in express terms."

"The proclamations are prohibitory, not permissive, and to read into either of them, such a general permission, is I submit unjustified."

And "apart from the executive order, there is no legal authority for extending British immunity and privilege beyond the cases of civil and commercial domicile in which the alien by making this country his home makes common cause with us, or by making it his permanent place of business supports our commerce."

"Finally, the aliens restrictions orders, ought to be interpreted only as imposing restrictions and not as conferring any rights, other than those were expressly conferred—*viz.*, the permission to remain in the country subject to various rigid restrictions, and such other rights as are necessarily involved in such permission *viz.*, to make such contracts as are needed for board, lodging, etc."

Recently, however, in the "*Princess Thurn & Taxis v. Moffitt* (1) *Sergeant J.* first gave the High Court decision on the point (which is since then approved by the Court of Appeal). In this case the action was pending at the outbreak of the war, and the plaintiff an enemy by birth was stated to have resided in the United Kingdom. She had complied with the orders in council, and the defendant's plea of alien enemy was refused.

This decision was cited with approval in *Porter v. Freudenburgh* (2), where the law was stated thus:—

"Under the term alien enemies, are included not only the subjects of enemy state, but also any British subject, or the subjects of any neutral state voluntarily resident in a hostile country."

The Courts are thus visibly inclining towards residence, as the sole test of enemy character. This would be further apparent, from the decision in *In re May Duchess of Sutherland* (3), where a similar plea was raised by the defendant, that the plaintiff was an alien enemy. It was held by Warrington J. that the action could be maintained as the plaintiff was neither residing nor carrying on business in the enemy state.

(1) 31 T. L. R. 24.

(2) 31 T. L. R. 162.

(3) 31 T. L. R. 394.

In *Scotland v. South African & Co. Ltd.* (1), the plaintiff an Englishman, was employed by the defendant, as manager of his estate situated in German South West Africa. The plaintiff sued for his salary and it was held, that the suit would not lie, as he was resident in an enemy country at the outbreak of war.

We may add also the case of *Tingley v. Muller* (2), where a contract was entered into by the plaintiff Englishman, with the defendant German, who was for forty years resident in England. In a suit by the plaintiff to avoid the contract, on the ground, that the defendant was an alien enemy, it was held by Eve J. that the plaintiff could not succeed, as it was not proved, that the defendant was actually in Germany at the time of contract.

It is apparent from these cases, that stress is now laid solely upon residence or rather upon "compliance with the Registration Orders"—and without these, neither birth nor naturalisation, nor even *domicile by itself* can remove the disabilities of an alien. The above statements, with regard to residence and commercial domicile, as determining enemy character, are in accordance with the Laws of England and United States (America). But the law in the continent, (Spain and Holland excepted) is different. There the doctrine of nationality by birth is still adhered to, and those enemies by birth, who are resident, or domiciled in England, may find themselves treated as alien enemies by the continental allies of England in the present war.

Enemy character
of juristic persons.

Before we quit this subject, it would not be irrelevant to say a few words, as regards the enemy character of Incorporated Persons. That these persons whether real or fictitious exist independently of the shareholders or members of whom they are composed, is a proposition which scarcely admits of any doubt. The domicile or legal residence of such artificial persons, is the country where they are incorporated or registered, or where the Head Office is situated : See *Attorney General v. Alexander* (3). In *Janson v. Driefontein & Co., Ltd.*, (4) it was laid down that a corporation constituted according to the laws of a foreign state, is a subject of that state and an alien, even though most or all of its members be British subjects. "I assume" said Lord Macnaghten "that the corporation was to all intents and purposes in the position of a natural born subject of the late South African Republic...If all its members had been subjects of the British Crown, the corporation itself would have been

(1) 31 T. L. R. 255.

(3) L. R. 10 Ex. 20.

(2) 33 T. L. R. 166.

(4) [1902] A. C. 484.

none the less, a foreign corporation, and none the less with regard to this country an alien."

This decision follows that of Mr. Justice Story, in the *Society for the Propagation of the Gospel v. Wheeler* (1) and is in entire agreement with the proclamation of 9th September, 1914, which lays down, that in the case of incorporated bodies the enemy character will attach only to those who are incorporated in an enemy country. It has been also laid down, says Nathan that the converse proposition must also be true, and that a company incorporated and having its Head Office in England, must be treated as a British subject, even though all its individual shareholders are alien enemies and as authority for this proposition, he cites the case of *Continental Tyre & Rubber Co. v. Daimler & Co.* (2). That was a suit by the plaintiff company, incorporated in England, to recover a sum of money, as the price of tyres, sold and delivered to the defendants; the defendants admitted the purchase, and delivery of goods, but resisted payment on the ground, that as all or most of the shareholders of the plaintiff company, were enemies, the payment would be for the benefit of the enemies, and as such would contravene the proclamation.

Lush J., held the plea to be unavailing, and decreed the plaintiff's suit, holding that the illegality of trade, does not depend upon the nationality of the parties, and this decision was affirmed by the majority of Judges in the Court of Appeal.

This case, however has now ceased to be any authority, for the decision of the Court of Appeal has been reversed by the House of Lords (3) and in reversing this decision, their Lordships have inclined to the view taken by Lord Justice Buckley in the Court of Appeal, that the corporation could not exist without corporators and it had no existence apart from them except in the imagination of the lawyers.

We are bound to say however, that in overthrowing this decision, the House of Lords, has overthrown the whole theory of incorporation, and has subordinated law to policy. The entity of the corporation is certainly distinct and separate from those of the individual members, and to regard it as an assemblage of shareholders and nothing more, is to subvert a principle of law, that has stamped itself into every nerve and fibre of modern jurisprudence. Moreover, it is not the nationality but the place of business that determines the enemy character in the case of individuals, and *a fortiori*,

(1) 2 Gallison 127.

(2) 112 L. T. 325.

(3) 194 L. T. 1049.

the same principles ought to govern the case of artificial persons as well.

However, the interests of the country demand, that a company consisting of enemy shareholders, should be treated as an enemy, and consistency and logic must give way to military necessity.

SUITS BY OR AGAINST ALIEN ENEMIES.

It is necessary to speak something, about the position of alien enemies as suitors in a Court of justice. The disabilities upon the suing capacity of the alien enemies seem to be as old as the English Law, and indeed the early law makes little distinction even between an alien friend and an alien enemy.

Littleton in his *Tenures* (Book II Ch I) while discussing the incapacity of a villein to sue his lord, compares the disability with five other cases of a similar kind. "There are six manner of men" he says, "who if they sue, judgment may be demanded if they shall answer," and besides the villein, the other five kinds are (1) the outlaw (2) the man against whom judgment has been given in *praemunire*, (3) the man who has entered a religious order (4) one who has been excommunicated by the Holy Church and (5) an alien; and if an alien will sue an action real or personal, the tenant or defendant may say, that he was born in such a country which is out of the King's Allegiance, and ask judgment, if he shall be answered."

Coke in commenting upon the passage, makes a distinction between an alien enemy, and an alien friend, and says "that the law doth distinguish between an alien, that is a subject, to one that is an enemy to the King, and one that is subject, to one that is in league with the King; and true it is that the alien enemy shall maintain neither real nor personal action until both nations be at peace, but an alien that is in league may maintain personal actions, for an alien may trade and traffic, buy and sell, and therefore of necessity he must have personal actions. *Coke's* commentary, says *Baty*, seems to be unauthorised, for the Courts in *Littleton's* time would certainly have viewed with disfavour, even an action instituted by an alien friend.

This would be further clear from *Bracton* in whose works, the idea of suit and that of personal allegiance to the lord, seem to be inseparably connected, and an alien was outside the ambit of the King's Court, though not of the King's protection. If the aliens had any grievances, they could look upon the King and the King alone

for redress. They were like the Plebians of ancient Rome, looked upon as Royal Clients.

Thus we see that the Flemish merchants were promised justice by a statute passed in the reign of King Edward II, and with a view to provide for those cases of injuries committed upon the foreigners at sea, that the Court of Admiralty was established by Edward III.

In the time of Coke a distinction was made between alien friends and alien enemies, and partly through the absorption of the principles of admiralty laws, partly through the intervention of the Lord Chancellors, and partly through the extension of foreign commerce and trade, the disabilities upon alien friends were removed, and the old law of exclusion from Court was limited to the alien enemies alone.

From the seventeenth century downwards we come across numerous decisions, in which the plea of alien enemy was successfully taken by the defendant.

In *Wells v. Williams* (1), decided in 1698, there was a suit upon a bond, and the defendant pleaded, that the plaintiff was an alien enemy. The Court held that as the plaintiff resided in England "by the King's leave and protection, without molesting the Government, or being molested by it," he might be allowed to sue; but it was distinctly held, that an enemy abiding in his own country could not sue here.

In *Brandon v. Nesbitt* (2), we come across a further confirmation of the same principle, it was a suit on a policy of insurance on goods, on board an American ship, and effected by the plaintiff as agent of an alien enemy. The defendant pleaded, that the persons interested in the goods, were aliens, born in foreign parts, out of the allegiance of the King, and the plea was upheld by Kenyon C. J.

And so firmly indeed was this principle engrafted in the English law of the 18th Century, that S. W. Scott, in the celebrated case of the "*Hoop*" based the prohibition of commerce with the enemy mainly upon the disability of the aliens to sue. "In the British Courts" he says, "no man can sue, who is a subject of the enemy, unless under peculiar circumstances that *pro hac vice* discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace, *pro hac vice*. But otherwise he is totally *ex lex*."

Not only is an alien enemy, disabled from instituting a suit, but

(1) 1 Ld. Raym. 282.

(2) 6 T. R. 23.

he can't proceed with the suit, even if the war breaks out, and he becomes an alien enemy, only subsequent to its institution.

Oppenheim in his International Law Vol. II, page 133 seems to hold the contrary opinion, and he maintains, that if during time of peace, a defendant obtains an opportunity to plead, and if subsequently war breaks out with the country of the plaintiff, the defendant may not plead that the plaintiff is prevented from suing. As an authority for this proposition he cites the case of *Sheepier v. Durant* (1). In this case, the defendant in a suit instituted by a Russian subject, before the outbreak of war with Russia, petitioned for a summons as soon as war broke out, to stay proceedings on the ground that the plaintiff had become an alien enemy. The Court refused the summons on the ground that the defendant had obtained an order to plead on the 23rd day of March, and war had broken out only on the 28th.

The decision however turned upon the peculiar rules of pleading that were in vogue in those days, and cannot be regarded as an authority in the present time, when these rules of pleading have become obsolete.

The Cases of *Le Bret v. Papillon* (2) and *Von Hellfeld v. Recknitzer* (3) may be cited as authorities against the opinion of Oppenheim, and in the last mentioned case which was decided during the present war, although the pleadings were closed before the 4th of August, 1914, yet the plaintiff was not allowed to proceed.

It appears to be reasonable also, that even if after the verdict has been given, but before the judgment has been pronounced, war breaks out, both the judgment and execution should be stayed. In *Venbryne v. Wilson* (4) an opposite view was taken. Although, an alien enemy cannot institute a suit in a British Court of Justice, yet a suit can always be maintained against an enemy defendant; and when sued the alien enemy, must be allowed all available means of defence, including representation by attorney, *Dorsey v. Kyle* (5) whether an enemy defendant could bring a bill of discovery to assist him in his defence, is somewhat doubtful, and in *Robinson v. Continental Insurance Co.* (6) the question was answered in the negative, for (it was said) "that would turn disability into a relief."

Bijan Kumar Mukerjee, M.A., M.L.

Vakil.

(1) 14 C. B. 582.

(3) *The Times* December 11th, 1914

(5) 96 American Decision 617.

(2) (1804) 4 East. 502.

(4) (1808) 9 East. 320.

(6) (1915) 1 K. B. 159.

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IN MEMORIUM.

THE LATE SIR CHUNDER MADHAB GHOSE, KT.

On Monday, the 21st January 1918 at 11 A.M. their Lordships the Hon'ble the Chief Justice and all the Hon'ble Judges, Counsel, Vakils, Attorneys, Court officers and others assembled in the Court of his Lordship the Chief Justice.

The Hon'ble the Chief Justice (Sir Lancelot Sanderson) on taking his seat said :

Mr. Chakravarti, Mr. Dutt and Mr. Mitter : The Full Court has met here this morning as a mark of respect to the memory of Sir Chunder Madhab Ghose whose death occurred yesterday morning. My learned brothers and I desire to express our great regret at this occurrence and at the same time to extend our sincere sympathy to the members of the family of Sir Chunder Madhab at the loss which they have thereby sustained. It is now some eleven years since Sir Chunder Madhab retired from the Bench after a long and honorable career as a Judge. After a successful career at the Vakil Bar he was appointed a Judge of this Court in the year 1885 and sat for no less than twenty-two years. I am sure you will all agree with me when I say that during these years he did much valuable and useful work in this Court. He was noted as a sound lawyer and he possessed that most important qualification of being able to apply his general knowledge of law to the facts of special and particular cases. He was further noted for the great care which he devoted to the cases which came before him, for the application of much common sense with which he was gifted and for the unfailing courtesy which he displayed to those who had the privilege of practising before him. By his life's work he laid the people of this country and the members of the legal profession under a very con-

siderable debt to him for during the whole of his long career on the Bench he laboured to maintain and succeeded in maintaining the high traditions of this Court which are of such great value and importance to this country.

Mr. B. Chakravarti said: My Lords: On behalf of the Bar I express my sorrow and regret at the death of Sir Chunder Madhab Ghose. He was born in the year 1838 in the District of Dacca and was educated in the old Hindu College, the predecessor of the present Presidency College. He graduated in the year 1861 at the age of 21. His ability soon attracted the attention of Government and he was appointed at that young age a Deputy Magistrate. He worked in the Government service for a little time but in 1862 he joined your Lordships' Court as a Vakil and soon acquired a much lucrative practice and commanded the confidence of both the Bench and the Bar as well as of the litigant public. In 1884 he was a Member of the Bengal Legislative Council and, as your Lordship the Chief Justice has pointed out, he was elevated to the Bench as a puisne Judge in 1885. With regard to his qualities as a Judge I had the honour and privilege of practising before him and I can assure your Lordships that his keen sense of justice and suavity of manners never failed. He was a painstaking Judge and he always took a broad and common-sense view of the matter and tried to do justice between man and man to the best of his abilities. In 1885, as I have already stated, he was raised to the Bench and in 1906 he officiated as the Chief Justice for some months. In 1907 as your Lordship has pointed out, he retired from the Bench. After his retirement his keen intellect was devoted to the improvement of social conditions of the people and he was accessible to all who sought his advice which was of value on account of his ripe judgment and vast experience. He has died full of years and full of honours and I can assure your Lordships that the gap created by his death in this country will be very difficult to fill in.

Babu Baidya Nath Dutt said: My Lords: On behalf of the Vakils of the High Court allow me to inform your Lordships that the death of Sir Chunder Madhab Ghose has caused a gap in Bengal. I was in Court when he was a Judge of the High Court and what I can remember with pleasure is his keen sense of justice and the uniform courtesy which he displayed towards the Members of the Bar. His death has not only removed a distinguished Judge and a Pleader but has caused a gap which will not be so easy to fill in. Most of your Lordships were not associated with him when he worked in the High Court, but those who were, will bear testimony to his sound

judgment and unfailing courtesy. The death of such a gentleman is a great loss to the country and it will not be so easy to find any other gentleman like him. As a Judge undoubtedly he was exceedingly distinguished, as a lawyer there was hardly any person like him but as a gentleman, I submit, there was hardly any man to equal him either in sympathy or in the manner in which he won the heart of all who came in contact with him. The history of his life has already been given by your Lordship so that I need not repeat them over again but I submit with confidence that a gentleman like him is not easily to be found either in the profession or outside the profession.

Babu Kalinath Mitter said: My Lords: On behalf of the Incorporated Law Society of Calcutta I beg to associate myself with everything that has been said by your Lordship the Chief Justice and by the other two speakers. Belonging to a humbler branch of the profession I cannot venture to say, probably it will be presumptuous on my part to say, much of Sir Chunder Madhab Ghose's legal acquirements, but with confidence, I can say that the litigant public had unbounded confidence in him as a Judge. He was courteous and suave in his manners. I knew him as a friend, as a sincere friend, and all I can say is that the Kayastha community has suffered a loss which is irreparable.

Their Lordships then retired and the ordinary business of the Court was resumed.

We are deeply grieved at the melancholy event and we fully endorse every word that has been said of the late Sir Chunder Madhab Ghose. We had the pleasure of publishing a very faithful and life-like portrait of Sir Chunder Madhab together with a brief sketch of his life and career in this Journal Vol. II, 79 n. We offer our sincerest condolence to his eldest son, Rai Bahadur Jogendra Chunder Ghose and other members of the bereaved family.

REVIEW.

Introduction to Juristic Psychology. By Probodh Chandra Bose, M.A., B.L., Calcutta 1917.—In this book the learned author has broken new ground and presented us with an interesting and instructive work useful not only to lawyers but also to laymen. Every phenomenon depends upon the medium in which it is pro-

duced. Law is also subject to this general rule. Law depends on the social medium in which it is applied. It is only in the bosom of society that law is formed or acts, because its task is precisely to fix and to limit human interests in relations to each other. Hence arises the importance of Juristic Psychology i.e., the study of the psychology of human behaviour from the standpoints of the maker, the administrator, the interpreter and expositor of law, of one who in any way deals with law or is affected by it. This book is divided into 19 chapters. In the first chapter, the learned author states and explains the nature and scope of Juristic Psychology, classifies the subjects into two main groups (1) The General Juristic Psychology and (2) Special Juristic Psychology and shows why his book deals mainly with general Juristic Psychology. In the next 11 chapters he deals with psychological subjects. Chapter XIII deals with the subject "The unsound mind from the legal, medical and medico-legal point of view." The last six Chapters (Chapters XIV-XIX) deal with subjects of utmost practical importance to lawyers *viz.*, Chapter XIV with Narration of the witness to the Judge and Jury, Chapter XV with Psychology of judgment, Judicial truth and Judge's mind. In Chapter XVI the learned author in dealing with the Psychology of crimes gives the definition of crimes according to Stephen, Markby and Mayne and discusses Lombroso's and Garofalo's views on the criminal as an anthropological type. In the section dealing with sociological view about the criminal, mention may be made of the Salvation Army Settlements in the Punjab for the reclamation of criminals, so highly spoken of by the Lieutenant-Governor of that Province. The section dealing with professional criminals is very interesting. We also find in this chapter the important subject of "The *mother* emotion of punishment and its operation" discussed. Psychology of admission, confession, Accomplice evidence, and behaviour as circumstantial evidence are the subject matter of Chapter XVII. Chapter XVIII deals with legal consciousness, Psychological origin of law &c., &c. Chapter XIX with the Psychology of the plaintiff's mind, the defendant's mind and the Legal Practitioner's mind. The masterly treatment of all these subjects clearly shows that the book is the result of immense industry and painstaking research. There is only one subject on which we want to draw the author's attention *i.e.*, the index. There is an index, but it is not comprehensive and we hope the learned author will make it more comprehensive in the next edition of his book. We can safely say that this work is a valuable addition to the legal literature of this country.

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THE SALE OF NON-TRANSFERABLE OCCUPANCY HOLDING • IN EXECUTION OF MONEY-DECREE AGAINST RAIYAT.

The application of the principle laid down by the Full Bench of the Calcutta High Court in *Dayamayi's* case (1) regarding the *involuntary* sale of non-transferable occupancy holdings has led to strange results which it is the object of the present article to discuss.

It was sometimes contended that, though there might be no custom or usage under which occupancy rights were transferable, they might yet pass in execution sales and that such transfers, though not valid against the landlord, would yet be valid against the former tenant. This however does not appear to be the law (2). For there is no ground for distinguishing a voluntary sale from a sale in execution, and if a sale by private contract would not validly pass it, then a sale in execution would not equally pass it, and *vice versa* (3). As pointed out by N. Chatterjea, and Greaves, JJ. in a recent case (4):—"The Full Bench have laid down that an involuntary transfer *i. e.*, a sale in execution of a money decree, (and not of a decree founded on a mortgage or charge voluntarily made) of the *whole* or *part* of an occupancy holding, apart from custom or local usage, is *operative against the raiyat*, 'where the *raiyat with knowledge fails or omits to have the sale set aside*' (1). It is true the question whether a raiyat is entitled to have the sale set aside or has the right to object to the sale before it takes place, were not in terms decided by the Full Bench. But if the raiyat has no right to object to the sale of occupancy holding in execution of a money decree *before* it takes place or has no right to have the sale (*after*

(1) *Dayamayi v. Ananda*—20 C. L. J. 52 F. B.

(2) Rampini's *B. T. Act*, 5th Ed., 122.

(3) *Dwarkan v. Harish*—I. L. R. 4 Calc. 925.

(4) *Badarinessa v. Alagi Gasta* (1915) 21 C. L. J. 650.

it takes place) set aside, in other words, where the sale is *valid* (i.e., e.g. where the holding is transferable), the sale would be *operative* against him, and it would be immaterial whether he had knowledge of the sale or omitted or failed to have it set aside. The sale however, though *invalid* (i.e., e.g. where the holding is not transferable) may be operative against the raiyat, if he *with knowledge* thereof *omits or fails to have it set aside*. The question, therefore, of the omission or failure to set aside the sale with knowledge thereof, becomes material only where *the sale is invalid* and the raiyat has a right to object to it. The Full Bench decision therefore *by implication* holds that the raiyat is entitled to have a sale of the holding in execution of money decree set aside *after* it takes place, and that the holding cannot be sold in execution of such a decree *where the raiyat objects to the sale before it takes place.*" * * *

Even in a case where the *decree-holder obtains the consent of the landlord to the attachment and sale of the holding, but the judgment-debtor (the raiyat) objects thereto* on the ground that it is not transferable, their Lordships have been pleased to point out that :

"as the raiyat cannot confer a title upon the purchaser without the consent of the landlord, so the *landlord alone, by his own act and without the concurrence of the raiyat, cannot create a title in the purchaser. The two must concur in order that the transfer may be valid.* Having regard to the view taken by the Full Bench as to the involuntary transfer, we are *unable to hold that the entire holding or a part of it can be sold in execution of a money decree if the raiyat objects to the sale even if the landlord give his consent to such sale.*" (1).

In the earlier case (2) their Lordships have been pleased to state further :—"Under section 60 Civil Procedure Code, 1908, all *saleable* property belonging to the judgment-debtor, or over which he has a *disposing power* which he may exercise for his own benefit, is liable to sale in execution of a money-decree. But a non-transferable occupancy holding is not saleable property, and the Full Bench decision does not hold that the raiyat has a disposing power over the holding. All that it holds is that a voluntary transfer is *operative* against him."

In the case just referred to (2) the occupancy holding was put up to auction in execution of a money-decree *at the instance of a third party*. But the question whether a *sixteen-annas landlord holding a money-decree* against one of his own raiyats can put up for sale in ex-

(1) *Narayani v. Nabin*—25 C. L. J. 351.

(2) *Badarenessa v. Alam*—21 C. L. J. 658.

execution that *raiyat's* occupancy holding not transferable by usage, arose in a very recent case before the Patna High Court and reliance was placed on that case. Sharfuddin and Roe, JJ. of that Court observed:—"The whole current of case law is against the sale in execution of an occupancy right without the consent of the landlord. It must be conceded that without the consent of the landlord an occupancy right is ordinarily not a saleable right. In the case noted below (1), it is *assumed* that the landlord cannot, against the wishes of the tenant, make this right saleable. On the *assumption* the rule propounded in some of the earlier cases is overridden * * In the first of these cases (2), the decision was ultimately based on the fact that the raiyat had failed to come in under S. 244 (C. P. C., 1882) and in the other (3), it is said:—"In any case the decree-holder takes the risk and in the present state of the law the purchaser will purchase at his peril. These two decisions can hardly be taken as decisive. But the decision in another case (4) is decisive. But so also is that in the case first referred to (1). To get at the root of the matter it is necessary to enquire into the origin and nature of the occupancy right. That enquiry has been made by Jenkins C. J. of the Calcutta High Court in the case noted below (5). The basis of all authoritative statements on the subject is that the right of occupancy is a right *personal to the particular raiyat*" (6). A personal right is *not a saleable right*. * * * Occupancy rights may by usage become transferable. But here there is *mutuality*. The *raiyats as a body desire* a conversion of the personal nature of the right. The *landlord acquiesces* in that desire. Before the nature of the occupancy right can be changed landlord and raiyat must concur. This was the *ratio decidendi* in the most recent decision of the Calcutta High Court (1). The power of voluntary transfer is the measure of the power of involuntary alienation (5). The landlord cannot extend that power without the consent of the tenant. And on these grounds, their Lordships overruled the objection of the raiyat (6). It may be permissible to point out, with due deference to their Lordships that, in the opinion of N. Chatterjea, J. of the Calcutta High Court the position that "the landlord cannot,

(1) *Narayani v. Nabin*—25 C. L. J. 351.

(2) *Dwarika v. Tarini*—I. L. R. 34 Calc. 199.

(3) *Shakaruddin v. Hemangini*—16 C. W. N. 420.

(4) *Annada v. Ratnakar*—7 C. W. N. 572.

(5) *Agarjan v. Pananulla*—I. L. R. 37 Calc. 687 (691).

(6) *Mac Pherson v. Dgeerbhushan*—2 P. L. J. 530. The head-note in the report is quite wrong.

against the wishes of the tenant, make this right saleable" (1), follows logically from the same Full Bench decision regarding the involuntary sale of the right and not a mere *assumption* of their Lordships of the Calcutta High Court in the case already referred to (1) as their Lordships of the Patna High Court seem to have supposed.

Further it follows from the Full Bench decision (2) that *after* the sale has been held, if the raiyat having no knowledge thereof (or of the proceedings leading thereto), applies to have the sale set aside, the *sale cannot be confirmed*, even though the decree-holder or the auction-purchaser *obtains the landlord's consent prior to the sale or secures a recognition of the purchase from him* subsequent thereto (3). But the sale can be held if the raiyat knowingly does not object and after confirmation of the sale the raiyat cannot raise the objection.

But with all respect to their Lordships it may be permissible to point out that the aforesaid Full Bench have gone further and definitely held that "a right of occupancy, which is not transferable by custom or local usage *can be transferred*," though "the holding apart from a right of occupancy cannot be transferred," (4), or, in other words, a holding with a right of occupancy attached to it *can be transferred*. And where the transfer is *voluntary*, the Full Bench have laid down that "it is *operative against the raiyat*." As explained by Mookerjee, J. in a very recent case (5):—"The decision of the Full Bench shows abundantly that in cases of transfer for value, title unquestionably passes from the transferor to the transferee, even though there is no recognition by the landlord" * * * and "although the validity of the transfer is liable to question by the landlord who is no party to the transaction, in other words, a transfer of this description cannot be impeached by the transferor, though the landlord may possibly refuse to recognise the transfer." If that is so, it follows that the raiyat has "*disposing power* which he may exercise for his own benefit" over the holding. A non-transferable occupancy holding can, therefore, be *attached*, and sold in execution of a money-decree against the raiyat. Further it may be observed that in view of the Full Bench decision it cannot now be rightly

(1) *Narayani v. Nabin* 25 C. L. J. 351.

(2) *Dayamayi v. Ananda* 20 C. L. J. 52 F. B. ; 18 C. W. N. 971 F. B. ; 42 Cal. 174 F. B.

(3) *Badarannessa v. Alam*—21 C. L. J. 650 (652).

(4) Vide judgment of the referring Judges in *Ambika v. Ram*—20 C. L. J. 84-85 and the F. B. decision in *Dayamayi's* case para. III—Ibid.

(5) *Beharilal v. Sindhubala*—22 C. W. N. 210—Ibid. 52.

contended that the right of occupancy is a right personal to the particular raiyat and that a holding in which the raiyat has a right of occupancy is absolutely unsaleable. It is *saleable* in one or other of the circumstances already mentioned (1), and I have just shewn that the raiyat has the disposing power over his holding. As explained in the case noted below (2), "the only person concerned in the transfer of a tenant's holding is naturally the landlord. If he consents to the transfer made by the tenant, there is an end of the matter." "The tenant in this case is the judgment-debtor; he is bound to pay his debt; and if the landlord, who is the only other party interested in impugning the validity of the sale of the holding in the occupancy of the tenant, consent to it, there is no reason why it should be open to the tenant to object to the sale." (3). The Legislature has declared in the Bengal Tenancy Act that such a holding may be brought to sale in execution of a decree for rent obtained by the landlord, that is to say, the whole body of landlords; and it has always been understood that if a raiyat sells his holding *with the consent of the landlord* the sale becomes effectual. It seems, therefore, that in principle there is no difference between the case of a voluntary sale made by the raiyat himself and an *involuntary sale held by the Court* if such sale is *consented to by the landlord*. The reservation, therefore, made by the Full Bench in favour of the raiyat—*viz* that in order to be operative against him it is necessary that "the raiyat with knowledge fails or omits to have the sale set aside" (4)—has no application to such a case *i.e.*, when the landlord gives his consent. Before the Full Bench decision it was held that a sale in execution of a money decree of an occupancy right is valid and effectual if the sale is held with the consent of the landlord (5). Even share of a holding could be sold with the consent of the co-sharer landlords to the extent of their share. Thus in a case in which the co-sharer landlords to the extent of a 15 annas share consented to the sale, the High Court maintained an order passed by the Court below granting the decree-holder's application for sale of an occupancy holding to the extent of that share observing that the non-consenting landlords may give their consent after the sale. In any

(1) The F. B. in *Dayamay's* case has definitely stated where the transfer by a raiyat is operative against the landlord.

(2) *Pahukdhar v. Manners*—I. L. R. 23 Calc. 179.

(3) *Dwarka v. Harrish*—I. L. R. 4 Calc. 925 (928); *Ananda v. Ratnakar*, 7 C. W. N. 572.

(4) *Behari v. Sindhubala*, 23 C. W. N. 210.

(5) *Ananda v. Ratnakar* 7 C. W. N. 572.

case the decree-holder takes the risk and in the present state of the law the purchaser will purchase at his peril." (1) And it was not thought necessary that the *consent* of the landlord should be obtained *prior to the sale* and the sale was held to be valid if the landlord subsequently to the sale recognised the purchaser and received rent from him (2). But N. Chatterjea, and Greaves, JJ. in a very recent case (3) observe: "The view taken in those cases can no longer be maintained having regard to the decision of the Full Bench which, as stated above, has impliedly laid down that a sale of an occupancy holding cannot be held in execution of a money decree if the tenant objects to the sale".

Be that as it may under the rulings above referred to, in the absence of custom or local usage to the contrary, a *raiya* holding in which a raiyat has only a right of occupancy is not saleable at the instance of any creditor of his other than the landlord seeking to obtain satisfaction of his decree for arrears of rent (4). But where the raiyat with full knowledge of the execution proceedings and the sale had failed to raise the objection at the time of the sale that the holding was not transferable and the question was raised after the sale had been confirmed and after the purchase had been recognised by the landlord it was held that the sale was valid. (2).

This, however, does not apply to a sale held in execution of a decree founded on a mortgage or charge voluntarily made by the raiyat in which case the transfer, though involuntary, is operative against the raiyat (5).

The Full Bench has made no distinction between the involuntary sale of the *whole* and a *part* of the holding and the principles deducible from its decision is applicable to both. (3).

Radharomon Mookerjee,

Vakil, Berhampore.

(1) *Shakaruddin v. Hemangani* 16 C. W. N. 513.

(2) *Dwarka v. Tarani* I. L. R. 34 Calc. 199; 5 C. L. J. 294

(3) *Narayani v. Nabin* 25 C. L. J. 351.

(4) *Bhiram v. Gopi* I. L. R. 24 Calc. 355; 1 C. W. N. 396—*Peari v. Rati* 11 C. W. N. 83.

(5) *Dayomayi's* F. B. case 20 C. L. J. 52; also *Sadavi v. Puaknath*—1 P. L. J. 257.

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CALCUTTA, APRIL 1, 1918.

{ No. 7.

IS A TAXICAB A COMMON CARRIER?*

The question whether one operating a taxicab service for hire is a common carrier of passengers is obviously a recent one; but since the taxicab is a mere mechanical successor to the horse-drawn hack, it would seem that it should be governed by similar principles and that, therefore, the two may conveniently be considered together.

It has been held that the term "common carrier" did not at common law embrace a carrier of passengers, but was confined to those carriers of goods who, by the custom of the realm, are made virtual insurers of the goods in their possession during the course of transportation (1). Because carriers of persons are not insurers of their safety, they are not, in this respect, common carriers except as to the passengers' baggage (2). However, it was recognized at an early date that carriers of persons, like carriers of goods, may by their undertaking so clothe themselves with a public interest as to incur the duty to serve all (3) for a reasonable hire (4), a principle of common law which was not restricted in its application to common carriers but was applied to many other callings (5). It is

* Columbia Law Review Vol. XVII, No. 8, p. 710.

(1) *Central Ry. v. Lippman* (1900) 110 Ga. 665, 36 S. E. 202.

(2) Story, *Bailments* (9th ed.) section 498; 2 Greenleaf, *Evidence* (16th ed.) section 211. Greenleaf's statement, *ibid.*, is typical of the earlier writers: "But hackney-coachmen, and others, whose employment is solely to carry passengers, are not regarded as common carriers in respect of the persons of the passengers, but only as to their baggage, and the parcels which they are in the practice of carrying."

(3) *Bennett v. Dutton* (1839) 10 N. H. 481; See *Jenks v. Coleman* (C. C. 1835) 2 Sumn. 221; 2 Kent, Comm. (14th ed.) section 602.

(4) See *Cole v. Goodwin* (N. Y. 1839) 19 Wend 251, 261.

(5) Thus, common innkeepers are under a similar duty to receive all, *Rex v. Pears* (1835) 7 C. and P. 213; See 6 Columbia Law Rev. 259, and cannot charge more than a reasonable price for the service rendered: *Morningstar v. La Fayette Hotel Co.* (1914) 211 N. Y. 465, 195 N. E. 656.

in this broader sense that the term "common carrier" is applied to carriers of persons, and really means "public carrier" (1).

That one engaged in the business of carrying persons in an automobile for hire is either a common (meaning public) or a special (meaning private) carrier of passengers, depending upon the circumstances, is self-evident. The real difficulty arises in determining into which class, under the facts in a given case, the carrier falls.

The rule announced in *Gisbourn v. Hurst* (2), that any man undertaking for hire to carry the goods of all persons indifferently, is, as to this privilege, a common carrier, has also been employed by the Courts in determining who are common carriers of passengers (3). Accordingly a carrier for hire, whether of goods or passengers, becomes a common carrier only when he holds himself out to serve one and all indiscriminately, (4), so long as there is no legal excuse for refusing (5). It matters not that he has no definite route, nor schedule, nor that his charges are not fixed. Nor does it matter that he fails to serve all indiscriminately, so long as he professes to do so, and this is a question of fact in each case. Thus, persons operating stage coaches, omnibuses, trucks, moving vans, and "jitneys" have been held to be common carriers where they represent themselves as willing to serve all. And it is not necessary that the exclusive business of the parties shall be carrying, in order to make them common carriers. On the other hand it is equally clear that those who do not hold themselves out to serve all but select such employers as they choose are mere private carriers. So, liverymen, conducting their business in this way, are not common carriers.

Whether one operating a taxicab service is a common carrier should, therefore, depend upon the manner in which the business is conducted. Where the vehicles are kept in a garage and are rented to those persons with whom the owner chooses to make contracts, it would seem that there is no holding out to serve all indiscriminately, but the business is similar to that of the liveryman. On the other hand, where it appears that a taxicab company has entered into contracts with a rail-road terminal company and with various hotels, obligating itself to furnish sufficient conveyances to meet the needs

(1) See Wyman, Public Service Corporations, section 183.

(2) (1710) 1 Salk. 249.

(3) *Benett v. Dutton* (1839) 10 N. H. 481.

(4) 9 Columbia Law Rev. 177.

(5) 10 Columbia Law Rev. 353.

of all persons using the station and the guests of the hotels, the undertaking to serve the public indiscriminately is sufficiently clear to make the taxicab company a common carrier. It is immaterial that the service is limited to persons using the station and guests of the hotels. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels or make use of the station and there call upon the taxicab company for service. While in this case the contract obligation is strong evidence of the undertaking, still the holding out may be evidence by conduct as well as by words. And, therefore, where the taxicabs are kept on the streets and make a practice of carrying whomsoever may choose to employ them, it is submitted that this practice makes them common carriers (1). In the recent case of *Anderson v. Fidelity & Casualty Co.* (2); involving the meaning of the phrase "public conveyance * * * provided by a common carrier for passenger service," in a double indemnity clause of a policy of accident insurance, it was held that one injured while alighting from a taxicab was not within the meaning of the clause. The taxicab in question was one standing upon the streets awaiting employment when it was engaged by the plaintiff and a friend to carry them to a point within the limits of the city in which the taxicab company did business. The Court decided that because the plaintiff and his friend had, for the time being, the exclusive right to the use of the taxicab, and because it was not operated upon a fixed schedule or over a definite route, it was not, therefore, "a public conveyance * * * provided by a common carrier for passenger service." It would seem that, in every case of general obligation to serve, the custom of the service qualifies the nature of the duty. Hence a sleeping car company which, although not a common carrier, is under a similar duty to the public, is not bound to give to an applicant the upper berth of a section already engaged, although such berth is vacant. Similarly a common innkeeper need not accept a guest when the regular bed chambers are occupied, although two beds might be placed in one room or there may be room in the public halls (3). Moreover, the argument employed in the principal case was rejected in the leading

(1) For the same reasons persons operating hacks and cabs upon the streets and holding themselves out to serve the public indiscriminately have been regarded as common carriers of passengers. *Lewark v. Parkinson* (1906) 73 Kan. 553, 85 Pac. 601.

(2) (1917) 100 Misc. 411; 106 N. Y. Supp. 640.

(3) *Brown v. Brandt*, [1902] 1 K.B. 696.

case of *Terminal Taxicab Co. v. District of Columbia* (1), where the Court admitted that the hirer of the taxicab would control the whole vehicle both as to contents, direction, and time of use. On the very point of construction of a double indemnity clause in a policy of accident insurance, there are cases in conflict with the principal case (2). Granting that there is possibly a narrower meaning of the term "common carrier" which would exclude taxicabs from the class, yet since the broader meaning undoubtedly includes taxicabs, the latter construction should have been adopted in the principal case because of the settled rule that where a policy of insurance is so framed as to leave room for two constructions, the word used should be interpreted most strongly against the insurer. It appears, therefore, that the decision in the principal case cannot be supported upon any ground.

(1) (1916) 241 U. S. 252.

(2) *Fidelity & Casualty Co. v. Joiner* (Tex Civ. App. 1915) 178 S. W. 806.

SHORT NOTES.

CIVIL.

1918.

R. A. Nos. 292
and 293 of 1917.

Ranga Lal Ganguly

Nritya Kali Debi.

February, 8.

Court-Fees Act (VIII of 1870), Sec. 5—Reference to Taxing officer—Application by respondent—Appeal accepted and registered.

Held, by the Taxing officer that there is nothing in section 5 of the Court-Fees Act to prevent a respondent as one of the parties to the suit, from making a reference to the Taxing officer, provided there is a difference between him and the Deputy Registrar as to the proper Court-fee which should be paid by the appellant.

It is open to the Taxing officer to deal with the question as to the correct Court-fee to be paid by the appellant, although the appeal was accepted and registered by the Deputy Registrar.

Babu Manmatha Nath Pal for the Appellant.

Babu Jyotis Chandra Hazra for the Respondent.

Application by the Respondent, praying that the appellant may be ordered to pay ad-valorem Court-fees on his memorandum of appeal.

The following order was passed by the Registrar (H. M. Veitch Esq.):

This is an application by the respondent in a Regular Appeal No. 292 of 1917 that the appellant may be ordered to pay *ad valorem* court-fees on his memorandum of appeal. The appeal has already been accepted and registered by the Deputy Registrar and a preliminary objection was raised on behalf of the appellant that, this being so, the Taxing officer has no power to interfere or deal with the matter under section 5 of the Court-fees Act. This view, however, for the reasons set out below, appears to me to place an unduly narrow interpretation on the words of that section, the relevant portion of which reads as follows:—"When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter, and any suitor or attorney, as to the necessity of paying a fee or the amount thereof the question shall when the difference arises in any of the said High Courts be referred to the Taxing officer." The officer whose duty it is to see that proper fees are paid is under the rules of this Court the Deputy Registrar, and it is suggested that the only occasions on which the Taxing officer can be called upon to interfere in a taxing matter is when there is a difference between the Deputy Registrar and an appellant and when the Deputy Registrar accordingly refers the dispute to the Taxing officer for decision. In the first place the term used is not "appellant" but "suitor" and the latter term is wide enough to include a respondent: See Mozley and Whiteley's Law Dictionary and Desai's Dictionary of Law Terms and Phrases in both of which the term is defined as meaning "a party to a suit or litigation." In the second place, section 5 merely says the question "shall be referred" to the Taxing officer and, if my view on the first point is correct, there is nothing in these terms to prevent a respondent as one of the parties to the suit, from making a reference to the Taxing officer, provided that there is a difference between him and the Deputy Registrar as to the proper Court-fee which should be paid by the appellant.

The specific point now raised does not seem to have been dealt with in any reported case, but the above view finds some support from the decision of the Madras High Court in *Ranga Pai v. Baba* (1), where it was held in another connection that the term "suitor" in section 5 of the Court-Fees Act could not be confined to an appellant.

I hold therefore that it is open to me as Taxing officer to deal with the question, as to the correct fee to be paid in this case.

Turning to the merits of the dispute the facts of the case are as

(1) (1896) L. L. R. 20 Mad. 392.

follows. Certain property having been acquired under the Land Acquisition Act the Collector awarded the compensation money to Nritya Kali Debi, a Hindu widow, the respondent in the present appeal, and the present appellant, with two others obtained a reference under section 18 of the Act to the Calcutta Improvement Tribunal. The widow claimed the money on the ground that the property was her 'stridhan' property: the objectors stated that the property was really her deceased husband's; that they were the reversionary heirs and that as the respondent had no power to alienate the properties, the compensation money should be invested and dealt with in the manner provided by section 32 of the Land Acquisition Act. The President of the Tribunal decided in favour of the widow and it is against that decision that the present appeal is preferred. The appellant therefore does not claim to receive the compensation money: he merely asks for an order that it be invested to safeguard his rights as reversioner. The contention of the respondent is that the case falls under section 8 of the Court-fees Act and reliance has been placed on two cases: *Sheo Rattan Rai v. Mohri* (1), and *Srimati Trinayani Dasi v. Krishna Lal Dey* (2). The facts of the first named case were exactly similar to those of the present case but it merely decides that in such a case the appeal must be stamped as an appeal from an original decree and not as an appeal from an order. In the case of *Srimati Trinayani Dasi v. Krishna Lal Dey* (2), this Allahabad ruling is quoted as deciding that in such a case *ad valorem* fees would be payable. I think, however, with all respect that this statement is based on some mistake. It appears from the report that the Judges referred the case to the Taxing officer "for his decision and report as to what stamp should be paid on this appeal; if it be considered as an appeal from an original decree." Then follow in brackets the words "the report called for having been supplied and the deficiency in the court-fee stamp having been made good, the appeal was put up for final disposal." There is nothing to show what the Taxing officer's decision was as to the fee payable.

The facts in the case of *Trinayani Dasi v. Krishna Lal Dey* (2) were exactly the reverse of those in the present case. There a Hindu widow appealed against an order directing the investment of the compensation money, and claimed to receive the actual money. This case is clearly distinguishable from the present case where the appellant does not claim compensation but merely asks for a direc-

(1) (1899) I. L. R. 21 All. 354.

(2) (1912) I. L. R. 39 Calc. 906.

tion that, to safe-guard his rights as reversioner the compensation money shall be invested. There is here no "claim" to an "amount of compensation" to bring the case under section 8 of the Act. The appellant's rights as reversioner might in certain circumstances be at any time defeated by the widow and as he is only one of the several reversioners the amount which he would receive on the widow's death is a sum which cannot be calculated now as there is no knowing how many of the reversioners will be alive on the widow's death. I think the case is one in which it may properly be held that it is not possible to estimate the subject matter in dispute at a money value. The case therefore falls under clause VI, article 17, schedule II of the Court-Fees Act and the memorandum of appeal has been sufficiently stamped with a stamp of Rs 10.

This order will also cover the similar application made in respect of the analogous appeal No. 293 of 1917.—

REVIEW.

Canadian Commercial Corporations by Victor E. Mitchell, Montreal, 1916.

This is an extensive work on the Law of Commercial Corporations as prevalent in Canada. The text occupies over 1600 pages while the tables and index account for another 800 pages. It would be a mistake however to suppose that the work is intended only for references. The first chapter gives a very clear statement of the general principles of the Law of Corporations and the subsequent chapters embody lucid expositions of successive topics. The work is characterised by lucidity of statement as also incisive criticism of judicial decisions. References are made not merely to Canadian decisions but also to the judgments of English, Scotch and Irish Courts and occasionally also to Australian judicial pronouncements. To the industrious lawyer who is not frightened by the size of the volume the perusal of many of the chapters will prove a veritable intellectual treat.

DISTRIBUTION OF THE HIGH COURT BENCHES.

Sanderson, C. J. and Beachcroft, J.—The criminal business other than undefended cases, and also all applications in connection with orders passed by civil Courts under sections 195 & 476 Criminal Procedure Code, and urgent applications in appeals from Original Side.

Woodroffe and Smither, JJ.—Privy Council matters and second appeals from Groups I & IV and miscellaneous appeals, and rules (not relating to regular appeals) of the same Groups.

Chitty and Walmsley, JJ.—Appeals under order 41, rule 11 from all Groups; and second appeals from Groups II & III, and miscellaneous appeals and rules (not relating to regular appeals) of the same Groups.

Fletcher and Shamsul Huda, JJ.—Letters Patent appeals, and second appeals from Groups II & III, and miscellaneous appeals and orders (not relating to regular appeals) of the same Groups.

N. R. Chatterjee and Newbould, JJ.—Regular appeals from Groups II & III, and rules relating to such Groups.

Teunon and Richardson, JJ.—Regular appeals from Groups I and IV, and rules relating to such Groups.

Chaudhuri J. and Greaves, J.—Original Side.

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SCIENTIFIC STUDY OF LAW.

On the threshold of a new course of study it is natural to ask (1) What is the object of the course of study? (2) What is the nature of the special subject of our study viz. Jurisprudence? (3) What is the use of this course of study? A complete study of the law may be divided into three stages. In the first stage the student acquires knowledge of those rules which make up the law, as mere isolated rules, this might be sufficient for a considerable skill and proficiency in practice. This corresponds with the syllabus of studies for the "Pleadership and Muktearship" examination in Bengal. In the next stage the student will comprehend those rules as parts of a classified and orderly system exhibiting the law as a science and such is the case with the students who go up for the Bachelor of Law Examination in this country. In the third—the final stage the student is to explore the realms of science which lie beyond the immediate boundaries of the law, and ascertain its origin, its essential nature, the method of its development, the function it fills in human society and the place it occupies in the general system of human knowledge, or in other words the student is to study what may be called the philosophy of the law. Such is the object of this course of study. The object of the M. L. course is to impart scientific legal education. The means of scientific knowledge of law is provided by *juristic methodology* (Garies *Science of Law*, section 59, page 303) which is also known as Methodology of Legal Science and it deals with the kind and method of study of the science of law. But the next question is, what do we understand by "scientific knowledge of law"? Scientific knowledge is knowledge which classifies its objects according to their similarities and differences, and according to their coordination and subordination, in a fixed, living and organized whole. The main characteristic of

Methodology.

scientific knowledge is that it is systematic. "Systematic knowledge of related facts" says Garies. (Science of Law, section 3, page 13) "is what constitutes a science". The scientific knowledge of any positive legal system may be acquired by three different methods, viz.—

(i) Dogmatic method.

(ii) Historical method.

(iii) Method of Interpretation.

(i) *Dogmatic method.* This method seeks to embrace the entire extent of positive law as a system, from the beginning, and to state it as such. In this method the isolated standards of legal order are regarded at once as parts of a system. They are arranged and organized according to the laws of logic, by means of definition and classification.

(ii) The *Historical method* endeavours to exhibit legal order as a progressive unity. It shows the origin, evolution, alterations and modifications of individual legal institutions in the efflux of the history of the social entity under whose authority regulative precepts of conduct develop into legal rules. Such study of any positive legal system is very difficult and unsatisfactory if there is no legal history of that country. Where it is historically established that the existing law of a country is a compound of foreign standards and domestic rules, each group of legal rules distinguished according to origin, requires special historical and dogmatic treatment and exposition.

(iii) *The method of interpretation.* It starts from the text of a given standard, preferably a legislative enactment and demonstrates the legal rule in itself, apart from its dogmatic connection and its historical development. It seeks to attain through the meaning of spoken words, as they are expressed, a systematic organization without which scientific knowledge cannot exist.

It should be noted here that the existence of these three methods of study separately, or in combination, indicates that the separate divisions of positive law do not necessarily coincide with the separate divisions of legal study which are called the departments or "disciplines" of study.

Departments of
Legal Science.

Now, the separate divisions or departments of legal study may be classified into 3 main divisions :

- I. Principal studies.
- II. Subordinate studies and
- III. Auxiliary studies.

The first division of legal study *i.e.* the subject of principal

studies may be subdivided into 3 classes (A) Private Law (including the Law of Person and Law of Things : Garies §§ 15—36. *Codification in British India*, Lects. VI and VII).

(B) Public Law (including Administrative Law. Criminal Law and Law of Civil and Criminal Procedure (See Garies § 60 and page 335. *Codification in British India* Lects. VI and VII).

(C) The third group is a mixed group composed of matters in common with both private and public law including International Law (public and private). This group includes (in England and Germany) church law, general and particular of the different creeds. The Laws of adoption, marriage and stridhan of the Hindus may be placed under this group.

II. The Subordinate studies may also be subdivided into 3 subdivisions, viz.

(A) *Subordinate historical studies* including the history of foreign and indigenous law e.g. *History* of English, Roman, Hindu and Mahomedan Law.

(B) *Subordinate "encyclopedic" study* or juristic survey including comparative law which is the basis of Philosophy of law (See Josef Kohler's *Philosophy of Law*, Vol. XII. Modern Legal Philosophy series)

(C) *Subordinate technical studies* including (a) Medical technic: medico-legal science necessary for expert proof and the establishment of facts in Civil and Criminal cases. (b) finger print study.

III. The Auxiliary studies include the study of all those sciences of which students of legal science who would accomplish success cannot be ignorant. (1) In the understanding of legal sources a knowledge of languages (e.g. Latin, Sanskrit and modern European languages) is especially requisite and a familiarity with general, political and economic history is equally necessary in the understanding of the law itself.

(2) Science of finance, theoretical and Practical Political economy.

Now such are the methods and departments or divisions of legal study and from this survey we can easily find out how much or rather how little of this course of study is covered by the syllabus of the B. L. Course of our university and what vast domain of unexplored region lies before us.

The second question is what is the nature of the subject of our study (Jurisprudence) in this course of lectures. We know that jurists may be classified into three groups (a) philosophical: To the philosophical jurists law is the expression of an idea. It is an ex-

pression of right and justice, *found* rather than *made* by legislator or Judge or text-writer : (b) Historical jurists : To whom also law is *found* and not *made* but to him the thing found is not an expression of an idea, but a principle of human action found by human experience and developed as a rule of law : (c), Analytical jurist : To whom the law, at least in its matured form and in developed communities, is the product of conscious and determinate human will. As the world has grown wiser with the march of time, each class of jurists has somewhat abated its pretensions and has each taken what is good from the other and we can even now hear the dying echo of distant din of clashing words of the Knights of the different schools across the seas. In England, the analytical and historical schools have been tending to a common ground. In Germany the philosophical and historical schools have been approaching each other. "This approach of schools" says Roscoe Pound (Introduction to Modern Legal Philosophy series vol. I) "formerly at sword's point has taken place through the development of comparative jurisprudence by both schools, through the abandonment by the philosophical school of the quest for a metaphysical science of absolute legal principles, and substitution of an endeavour to deduce and fix the element of the just in and out of the positive law, and through the giving over by the historical school of the view of their founder that the Roman lawyers of the 3rd century had such a monopoly of legal genius that modern peoples could do no more than develop Roman principles by experience of life and of litigation. Along with these movements, the rise and progress of that view of the political and social sciences which bears the awkward name of sociology has had an influence upon juristic thought the results of which for the most part, are yet to come ... to-day there are in Germany sociological jurists of philosophical, historical or analytical tendencies, rather than jurists exclusively philosophical, historical or analytical."

In England, America and in India we have as yet no sociological jurisprudence and no modern philosophical jurisprudence.

Every phenomenon depends upon the medium in which it is produced. Law is also governed by this general rule and it depends upon the social medium in which it is applied (Korkunov's Theory of Law BK. III. Chapter I, page 259). "The future" says Roscoe Pound, (Introduction to Modern Legal History series Vol. I. Garies Science of Law, page viii.) "will demand not merely that legal science be unified, but that it be unified with the social sciences of which it is by no means the least." The subject of this course of lecture will be mainly "sociological" not analytical or historical

jurisprudence. Now, what is the nature of society's influence over law and over the state, which is the form of social life most closely connected with law. This brings us to our *third* question—what is the use of this course of study. The answer to this question will clearly show the practical importance of this course of study.

The explanation of society has often been attempted and many theories about its origin and development have been advanced but all those theories may be classified under 3 heads.

viz. (1) The Mechanical Theory of Society.

(2) The Organic Theory of Society.

(3) Psychical Theory of Society.

(1) According to Mechanical Theory society is a wholly artificial creation, man's work is produced by his will. This conception of society prevailed in the 17th and 18th century. It was the consequence of other philosophical and psychological ideas. Philosophy at that time did not consider the universe as a living whole; the universe was divided into two distinct parts, spirit and matter, the two combined by a mechanical juxtaposition.

Society presupposes the combination of individuals. It cannot be the result of a single will. Several wills are necessary for its formation. The *mechanical theory* explained the formation of society as the result of an agreement amongst men, a *social contract*. The *cause* of this contract was merely the necessity of combining separate individual forces which were too weak for the combat with external nature. The power confided to society had no other *end* than the guaranteeing of external security and internal order.

The conception of social life thus established was an entirely individualistic one. The personality of the individual was regarded as the dominating principle and controller of social life. Nobody imagined that the individual depended upon the medium in which he lived.

This purely mechanical theory of the formation of society is today wholly abandoned as being in absolute contradiction with received history and psychology. History compels us to recognise the *social* state as the true natural state of man. Everywhere, even in the most remote times, men existed in a state of society and there is no reason to suppose that the *pre-social*, natural state out of which men emerged by means of a social contract, ever had any existence. Psychology on the other hand teaches us that the intellectual development of man is specially due to the *influence of his social environment*.

Korkunov Bk. III
p. 259.

Formation of
Society: Mechanical
theory, Korkunov,
p. 261.

Though the mechanical theory has now been given up we should recognize that it has played a great role in history. This theory is the first of the attempts to give a scientific explanation of social phenomena. Prior to it the social life was considered as the product of an outside force, independent of society and its elements.

Modified
Mechanical theory
of Fonillee and
Kareive.

The extreme consequences to which the organic conception has been drawn have led certain jurists, like M. Fonillee in France and Kareive in Russia, to turn back to the old mechanical theory of society with a little modification. They admit that society in its outlines is established independently of the human will, but affirm at the same time that its progressive development has resulted more and more from the interposition of human wills. They do not consider agreement—the formation of society by way of contract, as the starting point of social life, but on the contrary, as the result of a long social evolution as the purpose of social progress.

But this modified mechanical theory is open to criticism on several points—the motion of a *conventional organism* carries in itself an invincible contradiction. *Organism* and *contract* are two conceptions which exclude each other.

The Organic theory.

(2) The Organic Theory. The organic conception of society hardly appeared before the end of the 18th century, though in the most remote antiquity we meet with something like it. But the conception of an organism in the particular sense in which it is used now was unknown before the end of the 18th century. The Leviathan state of Hobbe's is only an immense machine. It is not a living organism but an automaton. For Descartes and his successors and other materialists animals were only machines moved in an automatic fashion. It was the same with the human body. The soul in connection with the body played the part of an indifferent spectator. *Spinoza* and *Leibnitz* had also the same opinion as regards the relation of the soul and body, but this was not the unanimous opinion of the sages of old. To this mechanical conception of life in man and in the animal is opposed that of *spiritism* of Pythagoras, Plato, Aristotle, Paracelsus, Van Helmont and Stahl. According to Stahl (who lived in the 18th century) the body is only an inert instrument, the puppet of some immaterial force and having no activity of its own. That immaterial force was the soul—the invisible time marker, who controls the movements of all the functions of the organism.

In the mechanical as well as in the spiristic theory the body is only a *machine*; but the difference between them consists in that the machine according to the mechanical theory, is considered as acting

automatically, and according to the *spiristic* theory as the passive instrument of the soul, as without independent activity. Out of these theories there could scarcely arise any clear opposition between the organic and mechanical conceptions. It was only after the appearance of the vital theory of Bichat at the end of the 18th century that such an explanation was offered. According to Bichat the phenomena of life are explained by special vital properties innate in the living matter which constitutes the living organism. This doctrine of vitalism created at once a complete opposition between living and dead matter, between a mechanism and an organism, between physical and biological sciences.

At the end of the 18th century there appeared for the first time in philosophy a clear opposition between the ideas of organism and mechanism, first in Kant and then in Schelling. Schelling explains all the phenomena of the universe by their analogy to the organic life.

To the influence of these new theories must be added the historical tendencies which had then already manifested themselves.

The mechanical theory explains social organization not as the result of a long evolution, but as an artificial institution of man's, may vary according to men's tastes and without relation to the past.

It sees no connection between past and present and is in its nature anti-historical.

The historical connection on the other hand emphasizes the connection between past and present. In seeking to establish its analogy the historical doctrine naturally turns to the organic side. "It is in such a medium that the past and heredity play an important part. For all these reasons the organic conception of social phenomena became very popular in the 19th century. The sociologists as well as the positivists adopted it. Of all the forms which the organic theory takes, the most accepted was that which agreeing with positivism identifies the laws of life with those of society. "Up to the present time" says Korkunov (page 278) "in fact, the organic doctrine has led to no distinct conclusion, has not to its credit a single previously unknown principle. It has given to matter which already existed only a novel form, has only furnished a new system of exposition." Such are the defects of the organic theory as a theory.

In studying sciences relating to inorganic world we see that all conceptions are based upon existing facts; all phenomena are determined by present conditions. In mechanics, in physics, in

Mechanical and organic theories of society.

chemistry, the doctrine of development, the history, the *embryology of the science*, if we may so call it, does not exist.

But if we look at the phenomena of organic life, we find that the study of isolated phenomena without examining their successive development is impossible.

Life according to Spencer is the capacity to adapt oneself to external conditions. This means that every animal can adapt itself to conditions because its existence is to that extent determined by its past, by the vital force received at birth. The *inorganic* world is determined by present conditions, the *organic one* by both the present and the past.

If we study the social phenomena the first point we want to know is whether these phenomena are determined by the present, or the past, or by both, or by some new element.

The general laws which govern the organic and inorganic world apply equally to the phenomena of social life. The *present* plays a great part in all societies. Such for example is the situation in which a state finds itself by reason of international conditions—the *past* also plays an important part in social affairs. Each generation has a certain influence upon the development of future generations' social life. The life and organization of a society yield the more to the influence of the past, the richer that past is in historic events and thus a society actually weak may nevertheless subsist a long time merely from the prestige of a glorious past e.g. the Jewish, the Indian and the Chinese communities.

By the side of the historic life which helps to determine social life, and with its present conditions favourable or otherwise, there is, besides, "a *third very important element* which constitutes the characteristic trait of social phenomena ; it is that man endowed with *memory and consciousness passes easily in thought from the past into the future*. Memory and desire are two sides of the same phenomenon. What man by his experience has gathered and accumulated in the past, he transfers under one form or another into the future. *He is capable, in a word, of forming a conception of the future, an ideal.*"

Society therefore is controlled by three following distinct elements :—

1. The present conditions under which it exists.
2. Its past.
3. The ideal drawn from the past.

(To be continued.)

B. K. Acharyya.

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CALCUTTA, MAY 1, 1918.

{ No. 9.

SCIENTIFIC STUDY OF LAW. (*Concluded.*)

The complexity of organic life, according to Claude Bernard, depends upon the fact that besides its *external* environment each organism has, so to say, an *internal* environment consisting in its own liquid element. To its *internal* environment is due the relative independence of the organism from its surroundings at any particular moment of its life. By this means is established its relation to the past; since this internal environment is a product of past activity.

If we apply this comparison to what takes place in social order, we may say that society has triple environment *viz.*

(1) *An external one*, formed at any given moment by its existing physical and geographical conditions and those of other societies then existing.

(2) *An interior environment*, composed of the customs and institutions bequeathed by the past.

(3) *A special ideal, intellectual environment.*

This triple connection of social phenomena with present, past and future time or in other words with the external, the interior and intellectual environment causes all the differences between society and organism.

Causes of difference
between society and
organism.

In affirming that society is affected by a special ideal and intellectual environment, we recognize that the bond connecting the different members of society has a moral, *psychical character* and thus explain the absence of any physical connection in human societies. Psychical phenomena are distinguished before all from material ones in that they do not rest upon any local base, the spiritual connection between the members of the same society does not require physical contact.

The dependence of social phenomena upon ideas of the future explains why societies know no natural death. In *organic life* vital

energy necessarily exhausts itself with time, and the more rapidly the more active the life. In *society* on the contrary although there is an equal expenditure of energy, there is no exhaustion because the expenditure is replaced by new force drawn in by the ideal which guides and inspires the whole society. Ancient customs disappear, old institutions become useless but this does not cause the death of the society.

If any society keeps its capacity for psychical creation, if it continues able to fashion a new ideal, the old and feeble customs will be replaced by new legislation (rather rules of law), new beliefs will arise and society will draw from them a new source of life. So there is no limit to the social life. Societies doubtless *can* and *have* perished, but differing in this respect from mechanical aggregates, they know no natural death and this same absence of death explains the absence of reproduction and multiplication, the one depending upon the other.

Defect of organic theory.

The *organic conception* of society cannot explain all social phenomena and must give place to the psychical conception of it, which recognizes the ideal that guides all human society, as a factor distinct from the social aggregates and which places the phenomena of social life side by side with those of the organic and inorganic world as an independent group, and one wholly apart from the phenomena of the world.

The mechanical theory of society, as pointed out before, denied history and its influence over social phenomena.

The organic theory on the other hand has always recognized the existence of a connection among social phenomena and affirmed the influence of the past in producing the facts of the present. It has given a new impulse to the scientific explanation of social phenomena. But this theory stops half way—it does not regard the future and leaves the important part played by the conception of future, in the development of society, out of consideration. The mechanical theory does not recognize the importance of the past—the organic theory regards the past but does not regard the future.

Psychical theory of society.

But the psychical theory recognizes the important part played both by the past and the future. There are numerous points of resemblance between the organism and society, but the society is an organism presenting important peculiarities arising out of its power of forming an ideal of the future.

If the capacity to form an ideal is a characteristic sign of all social phenomena, we must conclude that this capacity is in direct proportion with the development of social life. The weaker social

bonds are among people, the weaker their intellectual development and greater their carelessness of the future.

The next point to be noted about the *psychical* theory is that if the notion of the future, the capacity to create an ideal, is proportional to the development of social life, the conditions necessary for the development of the psychic faculty, creatress of the ideal, ought at the same time to serve for the development of social life. This is what in fact happens. The conditions for the development of the psychic life of the individual and those of the development of social life are identical.

If in the *organism* the independence of distinct cells is in inverse proportion to the development of the organism as an entirety, we cannot establish on the other hand in the *social life* that the independence of the members of the same society diminishes as the development of the society augments. But on the contrary, individual independence is one of the prime conditions of social development, where the development of individual thought is stifled, the growth of the social ideal is impossible, society retrogrades, finds its development paralyzed, its internal as well as external relations less active. If such a state persists, the existence of society is imperilled.

If the conditions of psychic and those of social development, are identical, we ought to understand why a human group in which the conception of the future plays an important part is very strongly united and capable of maintaining itself against unfavourable external conditions. Such is specially the case with the Hindu and Jewish society. The national life of the Hindus and Jews was controlled to a large extent by a conception of the future, in the case of the Hindus the future life and in the case of the Jews by the expectation of the Messiah, despite all the unfavourable conditions of their existence. The respective national bond which unites those people is really wonderful.

No possible limit can be placed on social ideal and therefore no possible limit can be assigned to social growth, and there is no model type which can be set up beyond which it is impossible to go. Such limits, such model types, on the contrary exist in the organic world. In society we notice another phenomena *viz.* a change of ideas can bring about a complete change in social life. Some of the followers of the historical school admit for society as for the organism a type determined *a priori* from which insignificant deviations are scarcely possible. According to them there exists in each people a quite settled natural genius and some pecu-

liabilities and functions equally settled and not subject to alteration in the course of historic evolution.

"This doctrine appeared in the political field" says Korkunov (Theory of Law, section 37, page 296) "as a protest against the tendencies towards revolution at the end of the 18th century, and against the attempts made to bring into our country (Russia) the political institutions of England."

According to these jurists the political organization of England is good for England alone, for it corresponds to a national genius very peculiar. France, Germany and other countries ought to develop themselves by other means more conformed to their national genius. Just as a bird cannot become a mammifer, so no state can change its institutions, its organization which is conformed to the national spirit.

But this doctrine of the Historical School is false and should be rejected, since a change produced in the social idea may bring about a change in the whole social development. The influence of one people upon the life of another is a proof of this. The ideal is a force supporting the social life and this ideal may be the result not merely of our own experience, but also of the experience of neighbouring peoples. By the study of another people's organization, of its political development, the members of a political society can form a political ideal like to that of such people. There should be assimilation of the ideals as in Japan, otherwise introduction of such ideals will be something like putting new wine in old bottles and will result in revolution and bloodshed as in Persia and Russia.

There is another reason why we should have scientific study of law. More than half a century ago the Second Indian Law Commission reported (see *Codification in British India* Lec. I page 65). "We have arrived at the conclusion that what India wants is a body of substantive civil law, in preparing which the law of England should be used as a basis, but which, once enacted, should itself be the law of India on the subject it embraced. The framing of such a body of law though a very arduous undertaking, would be less laborious than to make a digest of the law of England on those subjects, as it would not be necessary to go through the mass of reported decisions in which much of English law is contained. And such a body of law, prepared as it ought to be with a constant regard to the condition and institutions of India, and the character, religions and usages of the population, would, we are convinced, be of great benefit to that country . . . But it is our opinion that no portion either of the Mahomedan or of the Hindu law ought to be enacted

practitioners (however able they may be), are not capable of subordinating details to generalities and of perceiving the extent of such generalities and moreover are incapable (from want of any standard of comparison) of appreciating the defects of their own system. But at the same time it is erroneous to suppose that Theory and Practice are incompatible, though there are doubtless men to whom theory is more particularly useful; while there are others who would do well to avoid it. In order that even lawyers may be fitted for guiding legislation, it is necessary that they should be lawyers who not only possess the indispensable requisite of familiar acquaintance with the actual system, and with the actual position of the country, but should also be acquainted with the science of legislation, general and comparative jurisprudence and all those sciences (e.g. Political Economy etc.) from which the science of legislation, considered as the science of law as it should be, is in great measure derived. Without these studies they cannot and will not appreciate impartially and justly, the merits and demerits of the existing law, the wants of the country, the expediency or in expediency of proposed innovations." The talent and knowledge requisite for such a task cannot be acquired by a merely empirical study of any particular system of law, or by the mere habits of applying its rules to particular cases in the course of practice. They can only be acquired by "scientific study of law." The Indian Universities should therefore encourage the study of comparative jurisprudence and of such study as will produce "scientific" lawyers. We have the example of the Japanese to show how such a body of lawyers can be trained. To the student of comparative legal science and especially to the student of the Anglo-Indian jurisprudence Japanese law is of interest by reason of its long history and because of the extent to which its development has been modified by the reception and assimilation of foreign institutions. At the same time we should also remember that though the present Japanese legal system is derived from occidental nations, yet the power of assimilating western ideas Japan owes to nobody; it is the native genius of her people. The Japanese students absorbed foreign laws at Paris, Leyden, Leipzig, Berlin and the English Inns of Court. Almost simultaneously occidental law began to be taught in Japan. In a separate law school attached to the department of Justin and in two or three private law schools French law was taught, and also "natural law." This latter law "was simply general west European law viewed from a French angle." English law was taught in the Imperial University of Tokio from 1874. In 1887 legal instruction in the University of Tokio was reorganized in four

sections, English law, French law, German law and "Political science." Simultaneously, as in the theoretical reception of Roman law in mediæval Europe, there was an attempt to popularize the foreign law by translations and treatises in the native tongue. In 1879 was established a Government bureau for the "investigation of institutions" and one of the first products was a translation of the French Codes.

The study of comparative Jurisprudence is of great importance in India because the sources of Hindu law are not the same as those of modern laws, nor was the method of development of Hindu law the same as the present day method. According to Anglo-Indian Jurisprudence law is a command of the sovereign and the present theory of legislation in this country is not a theory of Hindu law but of modern jurisprudence. This change of theory is responsible for a good deal of the difficulties now met by the Anglo-Indian legislators and administrators. According to Hindu Jurisprudence law is regarded as commands not of any political sovereign but of the Supreme Ruler of the Universe. While on the one hand, the belief in emanation of Hindu law from the Deity "made it in theory absolutely unalterable by any temporal power, on the other hand, the very absence of temporal sanction in the majority of cases, and the feebleness of its connection with temporal authority rendered it practically a system most readily adaptable to the varying wants of society."

"Now," says Sir Gooroodas Banerjee (the Hindu Law of Marriage and Stridhan, 3rd Ed. p. 5) "the changes which have taken place in the course of time, both in the internal structure and the external surroundings of Hindu society, must have continually presented motives for deviating from the rules laid down in the primeval code—motives which could be but insufficiently counteracted by the spiritual sanctions by which most of those rules were enforced. This led to innovation, and what was excused as necessary and desirable innovation in one generation, came to be revered as custom in the next, and thus have been brought about, slowly but steadily, those numerous and important changes in the Hindu Law, which may be seen at a glance by comparing the prevailing practices of the Hindus with those enjoined or reprobated in the Institutes of Manu or any other ancient sage. ... To this mode of development of Hindu law by the displacement of old and obsolete rules by growing usages, the interpretation of texts by commentators has served as an important auxiliary. Each commentator under the guise of interpretation often moulded the ancient texts according

to his own views of justice or expediency. And, as the authority of each commentator was received in some places and rejected in others, there arose what have been styled the different Schools of Hindu law." Whenever the *sishtas* sanctioned any change, such a change was at first looked upon as necessary or desirable innovation. The legal consciousness of the people tolerated, though it did not welcome, such changes because they were approved by the *sishtas*. Now, because of the well-established principle of religious neutrality of the Government of the country the only people who are to discharge the duties of the *sishtas* of the present time are the lawyers who get scientific legal training.

Before leaving this subject I must mention a curious coincidence in the history of scientific legal education in the United States of America and in Bengal. In 1907, the then Vice-chancellor of the Calcutta University was pleading for the cause of scientific legal education in this country. The Association of the American Law Schools was also busy finding out means for attaining the object about that time in the United States of America. The movement began in these countries almost simultaneously but with what different results? What or how little has been done in this country is known to all. But in the memorial presented at the Annual Meeting of the Association of American Law Schools in August 1910 we read "We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We came to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers (1) but they must first be equipped with the state of learning in the world to date."

Acting upon this memorial a committee of five was appointed to arrange for the translation and publication of a series of continental master-works on jurisprudence and philosophy of law. The Germans classify science of law into *jurisprudence* on one side and philosophy of law, on the other. In such a classification, jurisprudence embraces the concrete elements of law, while philosophy of law deals with its abstract and fundamental side, (for discussion on this subject see Gareis' Science of Law note (3) in page 22). As the result of the labours of this committee we have got "the Modern Legal Philosophy Series" consisting of 13 valuable books which should be read by every serious student of law. Vols. I and IV of this series i. e. "The science of law by Karl Gareis translated by Albert Kocourek and "General Theory of Law" by N. M. Korkunov translated by W. G. Hastings of the University of Nebraska, have been recommended by the Calcutta University as the text books for M. L. Students. Besides the books of this series the students should also read "Evolution of Law." Select readings on the history of legal institutions, compiled by Albert Kocourek Professor of jurisprudence in North Western University and John H. Wigmore Professor of law in North Western University.

(1) This is exactly what the second Indian Law Commission remarked about systematization of law in British India. See *Codification in British India. Lec. I. page 65.*

B. K. Acharya.

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CALCUTTA, MAY 16, 1918.

{ NO. 10.

REVIEWS.

The Law relating to minors—by Sir Ernest John Trevelyan, D.C.L., Thacker Spink & Co., Calcutta. Fifth Edition, Price Rs. 16.

We welcome this fifth edition of Sir Ernest Trevelyan's Law relating to minors which has been thoroughly revised and brought up-to-date.

That a fifth edition of this admirable volume should be called for within so short a time of its publication is sufficient testimony to its merit. The book is already very familiar to our profession as a standard treatise on the subject and it is needless to say that it stands in no need of commendation. The work has been subdivided into 37 different Chapters and the subject has been exhaustively dealt with and nicely arranged in a very convenient way. The law on the subject as administered in British India has been carefully collected from the various statutory enactments, case laws, Indian as well as English and rules of Hindu, Mahomedan and English law, so far as they have not been superseded by statutory enactments. The book affords an admirably clear exposition of the principles of law relating to minors, its special feature being that the statements of fact and of law, and references cited in it are always exhaustive and accurate. We have no doubt that the book will maintain its high place and will prove a valuable addition to every Law Library.

Law of Contribution and Reimbursement by J. C. Bhaumik, B.L., published by Rai M. C. Sarkar, Bahadur and Sons, Calcutta, Price Rs. 2-8 as.—Mr. Bhaumik, in this handy little volume has made a fair attempt to place before the reader the law and the rulings, English and Indian, on this important subject of contribution and reimbursement. In the first chapter, the author deals in a very interesting way with the definition and scope of the

subject and devotes the following ten chapters to the law of contribution and reimbursement as enforced by the Courts of Justice in this country. The last two chapters mainly deal with forum, pleadings, decree, evidence, limitation and interest. We hope the book will be useful to the Bench and the Bar.

The Bengal Tenancy Act—by H. K. Haldar, M.A., B.L. Second Edition, R. Cambray & Co., Calcutta. 1916—We endorse word per word what we already said about the first edition of Mr. Haldar's Tenancy Act in Vol. XIX page 86n of our Journal. The popularity of the book is sufficiently proved by the fact that it passed through another edition. The book has been made very handy by the omission of all useless rulings and academic discussions. It has been brought up-to-date with Rules and Rulings and has been made very useful for all ordinary purposes. A new feature of this edition is that the "Practical difficulties" have been noted down under some of the sections.

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No. 11.

THE EVOLUTION OF CRIMINAL LAW IN THE EARLY ORIENT.

(5000 B. C.—600 B. C.)

"Le crime est toujours crime, et jamais la beauté
N'a pu servir de voile à sa difformité."

Crebillon, Pyrrhus, Act IV—Scene IV.

"Böses werk muss untergehen
Rache folgt der Frevelthat"

Schiller, Gedichte.

"Le crime avec soi porte son chatiment."

Duche, Absolon.

"Ben provvido il cielo
Ch' uom per delitti mai lieto non sia."

Alfieri, Oreste, Act I, Sc. II.

Ætiology of crime : Civilisation and Barbarism—Egyptian Criminal Law—Assyro-Babylonian Criminal Jurisprudence—Mosaic Penal Legislation.

Among the numerous social problems there is one specially whose certain and complete solution concerns us greatly. It is that of the influence of civilisation upon crime and insanity. If we judge by statistics alone we shall conclude that the problem is already solved, for in every country of Europe, except England we find that crime and insanity are each year increasing out of proportion to the growth of the population (see Dufau, "Traite de Statistique ; Joly, "France Criminelle.") But Mussedaglia rightly observes in this connection how easy it is to make a mistake in attempting to solve, on the basis of statistics alone, complex problems into which many factors enter at the same time. The continual increase of crime and

insanity can, in fact, be explained by changes in the civil and penal laws, by a greater tendency to bring accusations, by the easier access to asylums for the insane, and by the greater activity of the police.

One thing appears certain: Civilisation and barbarism alike possess certain crimes peculiar to them. Barbarism, by deadening the moral sensibilities, diminishes the horror of homicide, which is frequently admired as an heroic act. By making revenge a duty and confusing might with right, it increases crimes of blood and encourages associations of malefactors, just as among the insane it develops religious mania, demonomania, and imitative insanity. On the other hand, family ties are stronger, while sexual excitement and insane ambition are less frequent and consequently patricide, infanticide and theft are less frequent.

The types of civilisation which man has hitherto produced according to Prof Guglielmo Ferrero, are two: the type characterised by violence, and that characterised by fraud. They are distinguished by the form which the struggle for existence takes. In the antique civilisation, the struggle is carried on entirely by force and wealth and power are achieved by arms, at the expense either of foreigners or of weaker fellow citizens. Commercial competition between two peoples is carried on through armies and fleets, that is to say, by the violent expulsion of competitors from coveted markets. Judicial contests are decided by the duel. In the civilisation characterised by fraud, on the other hand, the struggle for existence is carried on by cunning and deceit, and the wager of battle is replaced by legal chicanery; political power is obtained no longer at the point of the sword, but by money; money is extracted from the pockets of others by tricks and mysterious manoeuvres, such as the operation of the stock-exchange. The Commercial warfare is carried on through the perfection of the means of production but still more through the perfection of the art of deceit, the skill acquired in giving the purchaser the impression that he is getting a good bargain. To the first type there belong, the Egyptian, the Assyrian, the Babylonian, the Hittite and the Persian civilisations. To the second type, on the other hand, belong all the modern civilised nations, that is to say, those among whom the capitalistic régime has reached its complete development. The distinction between the two types is not however, so absolute in reality as it is in theory, for characteristics belong to the two different types are often found mixed together in the same society (vide Ferrero, "Violenti e Frodolenti in Romagna).

Now since pathology, in the social field as in the physical, follows in the pathway of physiology, we discover those same two means of contest in the criminal world. As a matter of fact, there are two forms of criminality manifesting themselves from the time immemorial side by side; "atavistic" criminality, which is a return on the part of certain individuals of morbid constitution to the violent means of the struggle for existence now suppressed by civilisation, such as homicide, robbery and abduction; and "evolutive" criminality, which is no less perverted in intent but more civilised in the means employed, for in place of violence, it uses trickery and deceit. Into the first class of criminals fall only a few individuals, fatally predisposed to crime; into the second any one may come who has not a character strong enough to resist the evil influences in his environment. Sighele in his "*Delinquenza Settaria*," rightly observes that the same division occurs in the two forms of "collective" criminality which are to be found, the one in the upper and other in the lower ranks of society. On the one side are the rich or ~~well-to-do~~, who in politics and business sell their votes and influence, and by the aid of intrigue, deceit and speculation steal money from the public. On the other hand are the poor and ignorant, who in anarchist plots, in demonstrations and in insurrections attempt to revolt against the situation into which they are forced and the wickedness of those in high places. The first of these two forms are essentially modern and evolved, the second is atavistic, brutal, violent; the former is a thing of the brain and proceeds by cunning device, like imposture, misappropriation or forgery; the latter is a thing of the muscles and works by violent means, like insurrection, incendiarism or assassination. Confronted by these two forms of collective criminality, it is natural to ask ourselves, "why does the criminality of the rich take the form of cunning, while that of the poor is based upon violence?" The answer is easy. The upper classes represent what is really modern, while the lower still belong in thought and feeling to a relatively distant past. It is then logical and natural, that the former should show the result of modern development in their collective criminality and the latter should remain, on the contrary, still violent, not to say absolutely atavistic.

Therefore, indubitably from time immemorial the Criminal Law has been found an absolute necessity for the public order and the human society in general. To begin with the ancient Egyptians, (whose civilisation dates back to 5000 B. C. at least): But there is no reliable record of the principles which guided the Egyptian

judge in the punishment of the crime. There may have been much that was arbitrary in the administration of justice, even in the best bureaucratic period of the First Empire (c. 1600 B. C.), but that rules dating from a remote age and attributed to God Thot were appealed to is certain. A charge given by the king to his newly appointed vizier is preserved (*vide* Breasted, *A History of Egypt*), but scarcely touches the question. "Justice in Egypt and in the whole oriental world, necessarily emanates from political authority, and is only one branch of the administration amongst others, in the hands of the lord and his representatives. Professional magistrates were unknown, men brought up to the study of law, whose duty it was to ensure the observance of it, apart from any other calling—but the same men who commanded armies, offered sacrifices, assessed or received taxes, investigated the disputes of ordinary citizens. In every town and village those held by birth or favour the position of governor were ex-officio invested with the right of administering justice. The police were mostly recruited from foreigners and negroes or from Bedouin belonging to the Nubian tribe. The litigants appeared at the tribunal and waited under the superintendence of the police until their turn came to speak. Penalties were somewhat varied in the Egyptian Criminal Law—the bastinado, imprisonment, additional days of work for the *Corvée*, and for grave offences, forced labour in the Ethiopian mines, the loss of nose and ears and finally death by strangulation, by decapitation, by impalement and at the stake. Criminals of high rank obtained permission to carry out on themselves the sentence passed upon them and thus avoided by suicide the shame of public execution, (*vide* Spiegelberg, "Studien und Materialien" "pp. 69—76; Erman, "Beitrage zur Kenntniss des ägyptischen Gerichtsverfahrens;" Maspero, "Le Contes populaires.")

Accounts of several criminal trials are preserved—of robbers of the royal tombs (*vide* Breasted, "Ancient Records" Vol. IV, pp. 499-556) and of a conspiracy in the harem against the life of the Pharaoh, Ramses III. The punishment for participation with a guilty knowledge in the conspiracy was smothering alive in the ashes. From the end of the Middle Kingdom, there is a decree of king Intef deposing a nomarch and high official of the Temple of Coptos, apparently for harbouring king's enemies. He and all his descendants were deprived for ever of the power to hold the office. The consequences of a desertion to another country are hinted at in the Story of the Fugitive Prince Sinuhe, who was plainly in peril of death. In the earliest known international treaty concluded

between the Mittite king Sapalulu and Ramses II restoration of deserters and free pardon of them are stipulated for on both sides.

Secondly. In ancient Babylonia the business of the law was almost exclusively in the hands of the priesthood, for they included in their ranks, the scribes without whom there could be no books and no records. The halls of justice were usually at the gates of the temples and there the judges, the scribes and the "elders" assembled. The "elders" appear to have been a permanent body of officials, for the same name appears again and again upon tablets of about the same date. They played much the same part as the "elders" of the Old Testament (*e.g.* Ruth iv. 2, 9) and acted chiefly as official witnesses to the transactions which took place before them. The judges were appointed by Sovereign, who exercised a rigid supervision over them. Their duties were extremely varied, ranging from the highest criminal trials to the registration of business documents.

Our first introduction to the legal practice of the ancient Babylonians was in 1854 when Mr. W. K. Loftus disinterred a number of clay tablets from the mound of Tell Sifr. These tablets were found to be "contracts"—*i. e.*, to say records of business transactions, effected during the reigns of three monarchs, Rim-sin, Hammurabi and Samsu-iluna. It was at the Berlin Congress of Orientalists in 1882, that Dr. P. Strassmaier gave a clue to the reading of these tablets. Of late years Babylonian jurisprudence have been receiving the attention of a small but enthusiastic band of workers among the best known of whom are the late Dr. Oppert, Dr. F. E. Pieser and Dr. Bruno Miessner. But the laurels of the discovery of the complete Code of Laws promulgated by King Hammurabi of the First Babylonian Dynasty fall to the French. In 1897, the French Government deputed M. J. De Morgan to open excavations upon the site of Susa, the ancient city of the Persian Kings, for purposes of historical investigations. In 1901, he unearthed a large fragment of black diorite, with the complete Code Hammurabi inscribed on it. This constitutes one of the priceless treasures in the Louvre. There are indications in the Code itself of its being a mixture of older with later elements. It opens in fact with two statutes which show the ordeal as a test of guilt still in force; it assumes in certain instances the *lex talionis* as the basis of punishment, but by the side of such primitive views and procedures it contains many statutes revealing an advanced stage of society with highly developed ethical principles and elaborate means of establishing the guilt of one

accused of crime or misdemeanour with correspondingly nice distinctions in the endeavour to bring about a co-ordination between guilt and punishment and accompanied also by efforts to curb the parental and marital authority.

The reason of the retention of old laws by the side of later ones lies in the view common to antiquity, of law as a divine decree—an oracular decision of the deity. The Babylonian word for law is "*tertu*" which means an oracle. The decision in the dispute between parties was rendered by deity and originally no doubt before the image of the god. It was therefore binding for all times. But while it could not be abrogated, modifications at all times were introduced which practically changed its tenour and since the modifications take on the form of regulations super-imposed on the original law, the old was formally retained by the side of the new. So in the Code of Hammurabi the *lex talionis* is not unfrequently modified into a fine regarded as a *quid pro quo* in place of the literal original interpretation. We are not in a position to indicate the age of the oldest portions in the laws of Hammurabi. But we are safe in assuming that as early as the reign of the great law-giver, Urukagina (c 2700 B. C.) and probably considerably earlier, the endeavour was made to provide for the orderly conduct of the public and private affairs of the country by legal procedures. But taking Hammurabi's Code as it stands, it is both interesting and important to detect the systematic manner in which the statutes are put together. After a series of introductory regulations on evidence and judicial decisions, the entire domain of law under the two aspects of things and persons are divided into six groups: Personal Property, Real Estate, Trade and Business relations, the Family, Injuries and Labour.

But the distinction of classes in fixing fines and punishments is characteristic of the Code throughout, with class distinctions recognised in all walks of life, it was a logical conclusion to connect with the aim of bringing about a just proportion between punishment and crime which is the basic principle of the *lex talionis*—a differentiation according to the rank of the injured party. In other words, while according to modern ideas a crime is viewed independently of the one by whom or on whom it is committed, ancient law as long as it remained under the influence of *lex talionis* could not dissociate the act either from the actor as from the one who suffered through it. It is worthy of note however that the Code makes inadequate provision for wilful homicide. It would appear that this crime was treated as extra-judicial. It is enacted that a woman guilty of

murdering her husband should be impaled. The relatives of the man murdered by bandits receive one mina of silver (twice the price of accidental homicide). This would seem to show that the institution of blood-money was recognised in ancient Babylonia. On the other hand, man-slaughter rendered a man subject to the *lex talionis* and this certainly indicates that among the ancient Babylonians homicide was dealt with by the vendetta. It is therefore certain that wilful homicide was a family matter, with which the judicature was not allowed to interfere. (Vide C. H. W. Johns, "The Oldest Code of Laws in the World"; Prof R. F. Harper, "The Code of Hammurabi"; Ungnad und Köhler, "Hammurabi's Gesetz").

- *Thirdly.* The Laws of Moses: The Sacred Books of the Jews are written in the language called "Hebrew." This language was not confined to the Jewish community, but was the common tongue of all the ancient inhabitants of the Palestine, for the inscription of Meshia, King of Moab (c. 350 B. C.) is a specimen of Hebrew, as also are the lapidary memorials of the Phoenicians who dwelt on the coast of the Mediterranean. It is hardly necessary now-a-days to insist upon the fact that the well-known narratives of the Genesis, such as the two accounts of the Creation and the legend of the Flood are merely excerpts from Babylonian cosmogony and Babylonian Mythology. The discovery of the great Code of Hammurabi raises the very natural question as to whether the legislation of the Pentateuch is not also of Babylonian origin. It is true that the Jews attributed their legislation to Moses; but Moses (if he ever had any real existence!) must have lived seven centuries later than the Babylonian law-giver. Even in the life-legend of the Hebrew legislator we are confronted with Babylonian accounts, for the story told of the infancy of Moses is also related of the famous Babylonian monarch Shargani-Sharali who flourished about 3,000 B. C. and who is said to have been exposed in an ark of bulrushes upon the river Euphrates, whence he was rescued and grew up to be the ruler of all Babylonia (vide Maspero, *The Struggle of the Nations*).

Modern scholarship has dissected the Pentateuch into several superposed layers, ranging in date from about the eighth century B. C. to the time of Alexander the Great. The details of this dissection have been stated with great caution and moderation by Dr. S. R. Driver in his "Introduction to the Literature of the Old Testament." There are at least four systems of Legislation in the so-called Books of Moses in the following order: The Book of the Covenant—Exod. xx—xxiii; The Book of the Deuteronomy—

"The Book of the Law" ; The Law of Holiness = Levit. xvii—xxvi ; and The Priest's Code = The Balance of "Mosaic" Legislation.

The question now arises as to the originality of this Sinaitic legislation. In view of the Hammurabi Code, it was clearly unnecessary for Moses to seek for any supernatural guidance in framing a body of laws, seeing that such an excellent system had been worked out 700 years before, and the Israelites were on the eve of entering a land where the Babylonian legislation was in all probability well-known. Assuming however, that modern criticisms are right and that the laws in Exodus are no earlier than the prophets Hosea, Amos and Micah (i.e. the eighth century B. C.) we are so much the further removed from the time of Hammurabi and so much the closer to the fresh wave of Babylonian influence which was rapidly spreading westward owing to the Assyrian conquests. In any case, however, if there be any relationship between the Hebrew and the Babylonian legislations, there is only one possible conclusion, and that is that the Hebrew was borrowed from the early Babylonian. The additions of the Hebrew legislators were almost entirely of a theological character. The basic ideas of the Hammurabi Code are civil right and solid justice ; and considering the times and the circumstances these are very well realised by the Code. The king makes much of his devotion to the gods and the blessings they have bestowed upon him ; but theology is rigidly excluded from the Code itself. The deities are only called in to decide by the ordeal in cases where human insight fails, or to guarantee an oath where human evidence is wanting. In the Pentateuch, on the other hand, the theological interest is paramount. The principle of religious persecution is introduced from the very first, being inculcated even in the Book of the Covenant ; whereas religious persecution was entirely unknown in Babylonia, not only in the Code of Hammurabi, but throughout the whole range of cuneiform literature. Num. xxxi, 17-24 is a typical instance of the ideal Pentateuchal combination of blood-thirstiness and ceremonial zeal ; and one of the objects of the completed Torah is the establishment of a theological reign of terror. The same penalty is prescribed for petty infractions of ritual, as for the gravest crimes, and the Priest's Code is a wearisome litany of "that soul shall be cut off from his people" Unauthorised compounding of oil or incense is punishable with death (Exodus, xxx. 33, 38), so is the neglect of the Pass-over (Num, ix. 53), Sabbath-breaking (Exodus, xxxv. 2) or even doing "aught with an high hand" (Num. xv. 30). The fierce and

senseless intolerance of the Laws of Moses forms a significant contrast to the judicial dignity of the Laws of Hammurabi (*vide* Moore's article, "Exodus (Book)" in the *Encyclopædia Biblica*, Vol. 'ii).

Nevertheless, the earlier school of Assyriologists were led into many errors through paying too much regard to the fables of classical writers such as Ctesias, Diodorus Siculus and Herodotus. But though these authors have long been given up as misleading, the *ignis fatuus* of the 14th Chapter of Genesis still flickers over the field of Assyriology. If it were not for Gen. xiv, many commonly made assertions would never have been made and the Babylonian history would have been more sober and less imaginative. It is difficult to understand why this chapter should have had such hypnotising effect, for its fictitious nature is its most obvious characteristic. The well-known Orientalist, Professor Nöldeke demonstrated its unhistorical nature half-a-century ago and his conclusions have never been refuted. On the other hand, the successive codes of the Pentateuch display greater and greater Sacerdotalism as time goes on. It was entirely owing to the influence of the Babylonian Code of Hammurabi that the religious system of the Old Testament was cast into a legal form at all. The Hebrew language itself bears witness to the knowledge of codes of law engraved upon stone, like the monolith found by M. de Morgan at Susa. Hence when the Elohist writer of Exodus wished to describe the legislation, which he alleged had been supernaturally delivered to Moses, the legislation presented itself to his mind as something engraven upon stone (Exodus xxxii, 15, 16).

The legal codes of the ancient Hebrews were evidently anxious that the punishment should be justly proportioned to the offence, hence the obvious principle of equal retaliation found in the codes of many peoples, "of an eye for an eye, and a tooth for a tooth," and the laws providing for compensation for injury to property or person. But the use of barbarous punishments burning alive, mutilation, and flogging—is strictly limited; though the list of capital sentences is a little long and includes some, which according to modern ideas do not admit so severe a punishment, e.g. insult to parents. The principle of blood-money is recognised only to a very limited extent. The blood-relation of the murdered man has not only the right but is under the sacred duty to avenge the deed. The blood of the slayer alone can appease the divine wrath and cleanse the land (Num. xxxv, 33).

In the case of bodily injuries also, the law permits the application of *talionis* only where intention is to be presumed. In injuries